LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 386

JULES JEAN ROUGERON, *Petitioner,*

v.

JEANNE A. ROUGERON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

PHILIP W. AMRAM
700 Colorado Building
Washington, D. C. 20005

AMRAM, HAHN & SUNDLUN
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Treaties	4
Statement of the Case	5
(a) The family background	5
(b) The decedent's will	6
(c) The Swiss probate proceedings of April, 1954	6
(d) The post-mortem removal of the Swiss assets to New York and the New York probate proceedings of April, 1955	7
(e) The son's objection to the New York probate	8
(f) The Surrogate's dismissal of the objections to probate	9
(g) Initial decision against the son in Switzerland	10
(h) The New York accounting	10
(i) The son's victory in the Court of Appeals of Geneva in November, 1958	10
(j) The subsequent New York decree of distribution of December, 1958	11
(k) The widow's disobedience of the prior Swiss judgment in personam	12
(l) The proceedings before the Surrogate to vacate the decree of distribution of December, 1958	12
(m) Proceedings in the Appellate Division of the Supreme Court of New York	13
(n) Proceedings in the Court of Appeals of New York	14
(o) The 4-3 opinion of the Court of Appeals	14

Page

Reasons for Granting The Writ 17

Conclusion 35

Appendix 1a

CITATIONS

CASES:

American

American Railway Express Co. v. *Levee*, 263 U.S. 19 (1923) 19
Bacardi Corp. v. *Domenech*, 311 U.S. 150 (1940) 21
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 30
Byers v. *McAuley*, 149 U.S. 608 (1893) 29, 30, 31
Davis v. *Wechsler*, 263 U.S. 22 (1923) 19
Garner v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485 (1953) 19
Geofroy v. *Riggs*, 133 U.S. 258 (1890) 21, 25
Grant v. *Buckner*, 172 U.S. 232 (1893) 31
Hagan v. *Lucas*, 35 U.S. 400 (1836) 30
Hauenstein v. *Lynham*, 100 U.S. 483 (1879) 21
Hilton v. *Guyot*, 159 U.S. 113 (1895) 31, 32
Houdayer's Est., 150 N.Y. 37, 44 N.E. 718 (1896) 23
Hutchinson v. *Ross*, 262 N.Y. 381, 187 N.E. 65 (1933) .. 23
Kalb v. *Feuerstein*, 308 U.S. 433 (1940) 19
Kolovrat v. *Oregon*, 366 U.S. 187 (1961) 21
Morris v. *Jones*, 329 U.S. 545 (1947) 19
Overby v. *Gordon*, 177 U.S. 214 (1900) 31, 34
Peck v. *Jenness*, 48 U.S. 612 (1849) 29
Princess Lida of Thurn & Taxis v. *Thompson*, 305 U.S. 456 (1939) 30
Re Schneider's Est., 96 N.Y.S. (2d) 652 (1950), rehearing 100 N.Y.S. (2d) 371 (1950) 24
Riley v. *New York Trust Co.*, 315 U.S. 343 (1942) ... 29, 31
Santovincenzo v. *Egan*, 284 U.S. 30 (1931) 21
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) 19
State of Iowa v. *Slimmer*, 248 U.S. 115 (1918) 29, 31

Page

Taylor v. *Carryl*, 61 U.S. 583 (1857) 30
Tilt v. *Kelsey*, 207 U.S. 43 (1907) 29, 31
United States v. *Belmont*, 301 U.S. 324 (1937) 19
Williams v. *Benedict*, 49 U.S. 107 (1850) 30
Wyatt v. *Fulrath*, 16 N.Y. (2d) 169, 211 N.E. (2d) 637 (1966) 23
Yonley v. *Lavender*, 88 U.S. 276 (1874) 30

Swiss

Re Gemeinde Feldis, 24 B.E. 312 (1898) 24, 25, 26
Re Wohlwend, 9 B.E. 507 (1883) 20, 24, 25

CONSTITUTIONAL PROVISIONS AND TREATIES:

U. S. Constitution, Article VI 4
Swiss-United States Treaty of 1850, Article VI .. 5 *passim*

OTHER REFERENCES:

Falconbridge, *Renvoi in New York and Elsewhere*, 6 Vanderbilt L. Rev. 708 (1953) 24, 26
Miller, *Treaties and Other International Acts of the United States of America*, Vol. 5, pp. 869 ff 24, 26
Nussbaum, *American-Swiss Private International Law*, 47 Columbia L. Rev. 186 (1947) 24, 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

JULES JEAN ROUGERON, *Petitioner,*

v.

JEANNE A. ROUGERON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jules Jean Rougeron, Petitioner above named, prays that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York entered in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, dated May 5, 1966 are printed in the Appendix hereto, *infra,* page 1a and are reported at 17 N. Y. (2d) 264, 270 N.Y.S. (2d) 578, 217 N.E. (2d) 639. The judgment of the Appellate Division of the

Supreme Court of New York, entered without opinion, is printed in the Appendix hereto, *infra* page 13a and is reported in the New York Law Journal of July 9, 1965, page 7. The opinion of the Surrogate of New York County is printed in the Appendix hereto, *infra* page 16a and is reported in the New York Law Journal of February 4, 1963, pages 16-7.

JURISDICTION

The final judgment of the Court of Appeals (App. p. 1a) is dated May 5, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does Article VI of the Swiss-United States Treaty of 1850 fix the exclusive jurisdiction of courts and the exclusive choice of law in the case of disputed inheritances in the country of the last domicile of the decedent, or in the country in which the property of the decedent is located?

2. If the Treaty chooses the country of the decedent's last domicile, how is the Treaty to be administered where the decedent leaves personal property in both Geneva and New York and where the Court of last resort of the Canton of Geneva decides *in personam* and *in rem* that the decedent was domiciled there and the court of last resort of the State of New York decides *in personam* and *in rem* that the decedent was domiciled there? Do both courts have exclusive jurisdiction over all the property or does each court have exclusive jurisdiction over the property located in its territory on the date of decedent's death?

3. Where a citizen of the United States dies in Geneva, leaving personalty in Geneva and in New York, and the widow voluntarily initiates probate in the Geneva probate court asserting Swiss domicile of the decedent, and carries the probate through to the securing of conditional physical possession of the Swiss personalty, and the widow thereafter transports the Swiss personalty physically to New York and initiates an independent new probate of the same property, asserting New York domicile of the decedent, does the Treaty oust the jurisdiction of the New York courts to undertake this second administration of the property and deny the New York courts the right to distribute it to any heirs or legatees except under the law of Switzerland?

4. Under the facts stated in (3) above, has the New York court, wholly apart from the Treaty, competency and jurisdiction to administer the Swiss assets, which were transported out of Geneva to New York, in derogation of the pending Geneva proceedings, thereby thwarting the sovereignty of the Swiss court and that court's ultimate disposition of the property?

5. Can the exertion of a "self-help remedy" by a party to the Swiss probate proceedings, physically removing the Swiss property from Geneva to New York, change the jural international relations between the United States and Switzerland and oust the sovereign jurisdiction of the Swiss courts over property located in Switzerland on date of death and legally in the possession of the Swiss probate court in pending and incompleted probate proceedings?

6. Is the rule of this Court, that, in cases where two state courts of the United States have concurrent

and independent probate jurisdiction, the court which first acquires possession of the *res* is entitled to administer it to the exclusion of the other court, applicable to a case where one state court of the United States and one court of a foreign country are involved?

7. Absent any treaty, where the court of last resort of Geneva, subsequent to the transport of the Swiss personalty by the widow from Geneva to New York, enters a final judgment *in personam* and *in rem* against the widow decreeing the devolution and inheritance of the property which had its "situs" in Switzerland on date of death, may the New York Surrogate thereafter enter a judgment *in personam* and *in rem* in favor of the widow decreeing the devolution and inheritance of that same property in direct contravention of the prior judgment of the Geneva court?

8. Absent any treaty, when it is disclosed to the New York court that it has before it personal property located in Geneva on date of death which is subject to pending proceedings in the Geneva court, and which has been transported to New York *pendente lite,* is the New York court free to ignore the pending Geneva proceedings or is it required to direct that the property be returned to Geneva for distribution under the pending proceedings there?

CONSTITUTIONAL PROVISIONS AND TREATIES

Constitution, Article VI—"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

Swiss-United States Treaty of 1850, Article VI—"Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated."

(Note—a bi-lingual official text of the entire Treaty, issued by the Department of State, (GPO 879516) is photographically reproduced at page A177 of the Printed Record in the court below)

STATEMENT OF THE CASE*

(a) The family background

Marcel J. Rougeron, the decedent, was a native-born French citizen (Rec. A. 154, 234). As a young man in Paris in 1903, while still a French citizen, he fathered an illegitimate son, whom he promptly "acknowledged" legally, in conformity with French law (Rec. A. 143, 154, 232). The son was, and still is, a citizen and resident of France (Rec. A. 37, 154).

Later the decedent emigrated to the United States, became naturalized as a United States citizen, and married in Chicago in April, 1937 (Rec. A. 54, 143-4, 154, 234). His wife was also a native-born French citizen (Rec. A. 77, 144, 154), who became naturalized in the United States in August, 1959 (Rec. A. 70, 77), subsequent to final judgment of the Court of Appeals of Geneva of November 4, 1958 (see p. 10, *infra;* Rec. A. 172).

---

* All references to the Appendix printed *infra* are indicated by "App.". All references to the Printed Record in the Court of Appeals, State of New York are indicated by "Rec.".

(b) The decedent's will

The decedent and his wife were living together in a home purchased by the husband at Vandoeuvres, in the Canton of Geneva, Switzerland, on April 15, 1954, the date of his death (Rec. A. 41, 144). The decedent left a holographic will in the French language, dated February 18, 1954, in which he sought to disinherit his natural son and to leave his entire estate to his widow. Further, he directed that the law of Illinois [which he erroneously claimed to be the state of which he was a "native" or "citizen" or from which he "originated", or in which he was "domiciled as to citizenship" (Rec. A. 45, 54, 155, 164, 189, 191, 244)] should govern the disposition of his estate. (Rec. A. 144, 155.)

(c) The Swiss probate proceedings of April, 1954

Promptly after her husband's death, the widow, then a French citizen residing in Geneva (Rec. A. 45, 57, 70, 140, 143, 144, 154) with the assistance of her notary, M. Gustave Martin of Geneva, initiated a Swiss probate proceeding by filing the will on April 21, 1954 with the Justice of the Peace Court in Geneva, in conformity with the law of Switzerland and the Canton of Geneva (Rec. A. 89, 188).

On April 29, 1954, fourteen days after date of death, the widow and the notary jointly signed and filed an inventory of the decedent's estate in the appropriate tribunal in Geneva (Rec. A. 42, 46-56). The inventory described the decedent as domiciled in Geneva and identified cash items aggregating $5,538.97 and Sw. F. 23,395.00 plus 400 shares of DuPont, 900 shares of Alcoa, 100 shares of Atchison and 700 shares of

General Electric as property of the decedent located in Switzerland on date of death (Rec. A. 49-51, 180-2).

The April 29, 1954 inventory showed that the decedent also had deposit accounts in several New York City banks.

The widow, with the assistance of the notary, continued the required proceedings under the Swiss probate law (Rec. A. 89-90). This culminated on August 14, 1954, with the issuance to the widow by the probate court in Geneva of a preliminary "Certificate of Heirship" which certified preliminarily that she was the sole heir of the decedent and of his entire estate (Rec. A. 57, 190-3). This certificate is "preliminary" since it is "under the reserve of any action for nullification or petition of heredity" (Rec. A. 192). That is, it may be set aside or amended or altered, if, within the period permitted by the Swiss statutes of limitation, appropriate court proceedings are brought (Rec. A. 89-90, 100-3, 192).

(d) The post-mortem removal of the Swiss assets to New York and the New York probate proceedings of April, 1955

With the Swiss probate proceedings thus pending and not finally determined, all the assets above-listed which were in Switzerland on date of death [the exact details of this were directed by the Surrogate to be developed in supplementary proceedings if necessary (Rec. A. 128)], were transported physically to New York City (Rec. A. 121, 124, 127-8). No information respecting these assets or the inventory was given to the son (Rec. A. 61, 62, 173).

In January, 1955, the son commenced a proceeding in the court of the Canton of Geneva,[1] the place of the probate, seeking the appointment of a sequestrator (Rec. A. 233). The lower court granted the relief sought. The widow appealed. The Court of Appeals reversed and dismissed the request for the special relief demanded (Rec. A. 233-4).

The widow, still a French citizen residing in Geneva (see p. 6, *supra*), on April 1, 1955, filed in New York City, through the office of Kelly Drye Newhall and Maginnes, a petition for the probate of the estate of her husband (Rec. A. 34-40).

This petition in Paragraph 8 correctly recited the existence of some assets of the decedent in New York on the date of death (Rec. A. 36). However, it gave no hint that there had already been a probate in Geneva, that the property which had been in Switzerland on the date of death was then under the continuing jurisdiction of the Swiss probate court, that this Swiss property had been physically removed from Switzerland to New York, *post mortem,* and that it was intended to submit this identical property to a second administration by the Surrogate.

(e) The son's objection to the New York probate

A citation was duly served upon the son who opposed the grant of the letters, on the single issue of domicile and no other issue (Rec. A. 219-228).

---

[1] In the same month, proceedings were brought in the French courts by the son against the widow, which are irrelevant to the Treaty and constitutional issues here. These proceedings have been in the Cour de Cassation (Supreme Court of France) twice and are still pending and not yet finally decided (Rec. A. 136, 155, 201, 203-14).

The widow moved to dismiss the objections on the sole ground that the son was not a person entitled to object to the probate under New York law (Rec. A. 228, 232). The hearing on the motion to dismiss opened before Surrogate DiFalco on January 14, 1957 (Rec. A. 230). By an extraordinary coincidence, on that identical day the son instituted the formal contest *in personam* against the widow in the Geneva court to establish his share in the assets of his father which had been placed under the jurisdiction of the Swiss courts by the widow (Rec. A. 103, 104, 156).

No issue was raised at the hearing before Surrogate DiFalco respecting the physical location of the securities in question. All facts and information concerning the decedent's estate were denied the son in Switzerland from the date of decedent's death in 1954 until an order of the Court of Appeals of Geneva directed full disclosure in 1959 (Rec. A. 61, 62, 126-7, 173).

(f) The Surrogate's dismissal of the objections to probate

Surrogate DiFalco dismissed the son's objections to the grant of the letters. (Rec. A 232-9).

He found that the illegitimate son (even though he had been "recognized" by the decedent under French law) had no rights or standing of any kind under New York law to oppose the grant of letters. This ended the matter, but the Surrogate added two *dicta*. (1) He found the decedent's domicile to be in New York under New York concepts of domicile; and (2) he found the dismissal of the son's application for a sequestrator to be *res judicata* that the son had no rights of inheritance under Swiss law.

On May 16, 1957, a formal decree of probate was entered in favor of the Hanover Bank as administra-

tor, c.t.a. (Rec. A. 38, 72, 242-4), and the administration of the estate in New York proceeded in normal course.

(g) Initial decision against the son in Switzerland

The litigation in Switzerland likewise proceeded. Initially, the widow moved to dismiss the contest, on the ground of *lis pendens* (Rec. A. 156). This motion was denied (*ibid.*). Thereafter, the case was tried on the merits (Rec. A. 157), and the trial court, on April 14, 1958, dismissed the contest on the merits (Rec. A. 145, 150, 156). The son appealed on May 6, 1958 (Rec. A. 143, 157).

(h) The New York accounting

In New York, the widow and the Hanover Bank proceeded to an accounting and distribution of the entire estate before the Surrogate with no notice whatever to the son (Rec. A. 245-6). This included the assets which had been in *Switzerland* on the date of the decedent's death (Rec. A. 127-8).

On September 30, 1958, the Hanover Bank executed a petition for the settlement of its intermediate account (Rec. A. 248). A citation was then issued but this was issued to the widow only (Rec. A. 248). The son was never cited (Rec. A. 7).

(i) The son's victory in the Court of Appeals of Geneva in November, 1958

While these accounting proceedings were pending, the appeal in the Court of Appeals of Geneva was argued on October 14, 1958 (Rec. A. 149).

On November 4, 1958 (Rec. A. 154), the Court of Appeals of Geneva reversed. It granted the son a

statutory share in the estate. It ordered the widow *in personam* to turn over to appellant his share and to furnish him with full information as to the contents of the estate and a copy of the inventory (Rec. A. 173). This judgment of the Court of Appeals of Geneva was final and *res judicata*. (Rec. A. 140)

(j) The subsequent New York decree of distribution of December, 1958

In the face of this judgment *in personam* against the widow, counsel for the widow and the Bank, on November 21, 1958, *seventeen days thereafter,* filed an affidavit certifying that only the widow had been cited and served with respect to the pending account in the Surrogate's Court (Rec. A. 245-6).

In the face of this judgment *in personam* against the widow, she requested the Hanover Bank on November 25, 1958, *twenty-one days thereafter,* to deliver to her in kind the Alcoa, Atchison, DuPont and General Electric stock certificates some or all of which had been in Switzerland on the date of death, and were still under Swiss administration. (Rec. A. 50, 127-8, 246-7).

The widow and her counsel permitted Surrogate Cox, on December 2, 1958 (*nearly thirty days thereafter*), to enter his decree on the accounting. This decree recites that the citation was issued to the widow only; it recites her request of November 25, 1958, *supra;* it approves the accounting up to September 18, 1958; and it directs the transfer to her of the four blocks of stock certificates in kind (Rec. A. 248-52). This was in direct contradiction of the prior Swiss final judgment of the Court of Appeals of Geneva.

(k) The widow's disobedience of the prior Swiss judgment in personam

In Geneva, in order to conform to the decision of the Court of Appeals (the court of last resort, Rec. A. 103), the 1954 "preliminary" certificate of heirship (Rec. A. 190), was amended "finally" on October 8, 1959, to certify the rights of the son (Rec. A. 194).

The widow has never obeyed the order of the Swiss Court, in whole or in part. The judgment of the Court of Appeals of Geneva of November 4, 1958, for the first time gave the son access to the contents of the estate and inventory (Rec. A. 61-2, 126-7, 173). Later, after the son's attorneys obtained access to the facts and to the governing documents late in the year 1959 (Rec. A. 61, 62, 126-7, 173), this proceeding was instituted in the Surrogate's Court (Rec. A. 26-64).

(l) The proceedings before the Surrogate to vacate the decree of distribution of December, 1958

The present proceedings began with a petition of the son to vacate the Surrogate's decree of probate dated May 16, 1957, *supra* (Rec. A. 27).

The son amended this claim to abandon any attack on the decree of probate of May 16, 1957 (which was concededly a valid and proper decree and immune from attack) and to concentrate on an attack *pro tanto* of the Surrogate's decree of distribution of December 2, 1958, insofar as that decree distributed the assets which were in Switzerland on the date of the decedent's death in accordance with the New York law of devolution (Rec. A. 6, 124). The matter has proceeded thereafter on that amended claim only.

At the hearing before the Surrogate the son based his claim upon the Supremacy Clause of the United States Constitution and the Swiss-United States Treaty of 1850. He asserted that the provisions in Article VI of the Treaty limited the jurisdiction of the Surrogate's Court and fixed a mandatory "choice of law" as the "supreme law of the land" (Rec. A. 7, 114-126). He further relied on the argument that the initial Swiss probate and the jurisdiction of the Swiss courts required the New York court to "stay its hand" (Rec. A. 120-4).

The widow defended against this claim on the merits and on the separate ground of estoppel, namely, that the son, by failing to appeal from the decree of probate of May 16, 1957 was estopped to attack the subsequent decree of distribution or raise any questions under the Treaty or the Supremacy Clause.

The Surrogate, following the close of the hearing and the filing of briefs, sustained the estoppel defense (App. p. 17a) and refused to consider any federal, Treaty or constitutional questions.

(m) Proceedings in the Appellate Division of the Supreme Court of New York

The son appealed from the Surrogate to the Appellate Division, raising the same federal and constitutional questions. (See App. p. 14a).

The Appellate Division affirmed the Surrogate without opinion, i.e., sustained the Surrogate's adjudication of the existence of an estoppel against the son, which forbade him from raising any of these federal, Treaty or constitutional questions.

(n) Proceedings in the Court of Appeals of New York

The son then appealed as of right to the Court of Appeals on federal constitutional grounds. (App. p. 10a) The widow filed a Motion to Dismiss on the ground that there was an adequate State ground at issue, i.e. estoppel and no federal or constitutional questions. The Court of Appeals denied the Motion to Dismiss. *Matter of Rougeron,* 14 N. Y. 2d 882 (1965).

(o) The 4-3 opinion of the Court of Appeals

The Court of Appeals affirmed in a 4-3 decision.

The majority opinion conceded the existence of the federal questions, i.e. "'consideration of the Treaty or of the proceedings in the Swiss courts now to be discussed" (App. p. 3a); recited the initial Swiss probate and the widow's assertion of the decedent's Swiss domicile (App. p. 3a); the widow's obtaining possession of the property located in Switzerland under the "preliminary certificate of heirship" and her subsequent removal of that property to New York (App. pp. 3a-4a); and recited the Swiss decree of November 4, 1958, deciding the substantive rights of the son in his inheritance. (App. p. 4a)

The majority opinion also conceded that the Swiss decree adjudicated that *the Swiss courts had exclusive jurisdiction* and *Swiss law was exclusively to be applied, under the Treaty,* (App. p. 4a; and further that the decedent was domiciled in Switzerland under *Swiss concepts of domicile.* (App. p. 4a).

The majority opinion passed over the widow's argument of estoppel (App. p. 5a) and held that "the meaning and application" of the Treaty "must be reviewed". (App. p. 5a)

The majority opinion then squarely held that the Treaty, in using the words "the country in which the property is situate", meant "the country of the last domicile of the decedent". (App. p. 7a). The majority opinion relied for authority on the writings of certain commentators, citing no authority of this Court or any federal court, since no such authority exists.

Concluding that the Treaty was a statement of the "conventional domiciliary rule as to personal property", the majority opinion sustained the jurisdiction of the New York courts over the Swiss property and the application of the New York law of devolution, giving no effect whatever to the pre-existing Swiss probate proceedings, the transport of the Swiss property from Geneva to New York *pendente lite* and the judgment *in personam* of the Swiss court. Having reached the conclusion that the Treaty was a "domicile" Treaty, the majority opinion then proceeded to ignore the real questions before it, namely, (1) What is to be done when proceedings are undertaken in *both* countries, and the courts of *each* country decide that the decedent was domiciled there, under its concept of domicile, so that each court decides that it has jurisdiction and its law of devolution applies? (2) What is to be done with the two diametrically opposed judgments of distribution of the same personal property? (3) What effect is to be given to the fact that such a "domicile" interpretation leaves both the Swiss and the New York judgments in full force and effect and provides for no choice between them? (4) What is to be done when one of the parties physically picks up a *res* which is *sub judice* in pending probate proceedings in one country and physically transports the *res* to another country and commences independent probate proceedings there?

The three dissenting judges disagreed fundamentally with the majority opinion.

There was agreement on the fact that there was no estoppel of any kind (App. p. 9a), but there was complete disagreement on everything else.

The dissenting judges stressed:

(1) their disapproval of the holding of the majority opinion, which gave the widow the right to "take the law into her own hands" to:

(a) change the devolution of property by using Swiss law to secure preliminary custody of the property and then spiriting it out of Switzerland.

(b) frustrate the pending Swiss proceedings by a self-help removal of the property.

(c) change the "choice of law" under the Treaty by the self-help removal of the property.

(2) the unique situation that the decedent was found domiciled in Switzerland under Swiss doctrines of domicile and found domiciled in New York under New York doctrines of domicile, a point to which the majority opinion ascribes no effect.

(3) that the New York courts had no jurisdiction over the Swiss assets or, in the alternative, was required to remit them to Switzerland for distribution under the Swiss decree.

(4) the need for a "suitable respect for the decrees of other civilized countries" which would deprive the New York court of power to frustrate the Swiss decree of devolution.

REASONS FOR GRANTING THE WRIT

A. This case raises questions of national and international importance never previously considered by this Court on the meaning and interpretation of Article VI of the Swiss-United States Treaty of 1850, and specifically:

(1) is the exclusive jurisdiction of courts and the exclusive choice of the law of devolution to be fixed by the "domicile" of the decedent at date of death or by the "situs" of property at date of death?

(2) do the words "place where the property is located" mean "place of the last domicile of the decedent" or do they mean what they say?

(3) if it is a "domicile" Treaty, how will it operate where courts of both countries independently decide that the decedent was domiciled in that country, so that both courts claim exclusive jurisdiction, both courts apply their own law, and two decrees are entered *in personam* and *in rem* containing antithetical distribution of the same property?

B. This case raises questions of national and international importance never previously considered by this Court as to the rules for the reconciliation of antithetical decrees *in personam* and *in rem* of a Swiss Cantonal Court of last resort and a State Court of last resort of the United States, determining the inheritance of personal property physically located in Switzerland on date of death, in independent actions in the two courts between the same parties and with respect to the same property, both decrees being entered in

alleged conformity with the Swiss-United States Treaty of 1850.

C. This case raises questions of national and international importance, never previously considered by this Court, as to the duty of a State Court of the United States either under the Treaty or, wholly apart from the Treaty, to stay its hand and refrain from undertaking the probate distribution of assets of a decedent, where probate proceedings for the distribution of those very assets are then pending *in personam* and *in rem* in the courts of Switzerland, the place where the decedent died and where the property was physically located on date of death, the property in question having been submitted voluntarily for probate administration and distribution to the Swiss court by the decedent's widow following the death of the decedent.

D. This case raises questions of national and international importance, which have never been previously considered by this Court of the right of a party to litigation *in personam* and *in rem* in a foreign country to remove the *res, pendente lite,* to the United States and by such self-help to frustrate the sovereignty and jurisdiction of the foreign tribunal and the ultimate final judgment *in personam* and *in rem* of the foreign tribunal.

E. This case raises questions of national and international importance never previously considered by this Court of the application of the doctrines of comity and of the recognition of foreign judgments *in personam* and *in rem.*

* * * * *

1. It will be obvious, from the preceding statement of the questions here presented, that this case presents

both Treaty questions and questions of international law absent any Treaty.

It is the contention of Petitioner that the majority opinion of the Court of Appeals is wrong (and the dissenting opinion of the three dissenting judges is right) by virtue of the Treaty, and, independent of the Treaty, on basic principles of international legal relations.

It is further the contention of Petitioner that these vital questions of national and international law should not be finally decided by this 4-3 opinion of the Court of Appeals of New York, (which will be the leading and only authority in the United States on the subject matter) without review and decision by this Court.

2. We can dispose quickly of any suggestion that there is an "adequate State ground" for the decision, i.e. that the case was decided on a point of procedural estoppel under State law and the federal questions need not be reached.

Both the majority and dissenting opinions excluded estoppel (App. pp. 5a, 9a) and both opinions decided the federal questions on the merits.

Further, this Court has ruled that it would be unconstitutional to refuse to decide a federal right in a State proceeding on the ground that the party raising the federal question was estopped from so doing by some procedural estoppel under the State practice. *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940); *Davis* v. *Wechsler*, 263 U.S. 22 (1923); *Morris* v. *Jones*, 329 U.S. 545 (1947); *American Railway Express Co.* v. *Levee*, 263 U.S. 19 (1923); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485 (1953); *United States* v. *Belmont*, 301 U.S. 324 (1937).

3. There is no ambiguity as to the purpose and intent of Article VI of the Treaty.

The Swiss Federal Supreme Court stated the purpose of the Treaty in *re Wohlwend,* 9.B.E. 507 (1883) at p. 513:

> "For Article VI sets forth a positive rule of international law, equally binding in both Treaty states, for the case where a citizen of one Treaty country dies in the other or leaves property in the other's territory."

There can be only one purpose and intent: to avoid unseemly conflict between the courts of Switzerland and of the United States, where courts of both Treaty countries claim jurisdiction over a disputed inheritance and the right to apply their local law to determine the devolution of the property in dispute, so that a head-on conflict will result.

The Treaty makes it clear that only one court is to have exclusive jurisdiction and that only one law of inheritance is to apply exclusively to the dispute, so that no head-on conflict can result.

The Treaty is, of course, unnecessary and inapplicable if only a single court of one Treaty country, and no other, claims jurisdiction over the dispute and only one law of devolution is sought to be applied.

Conversely, the Treaty is essential if a situation arises in which courts of both Treaty countries claim jurisdiction and claim that their local law of devolution is to be applied, so that a choice is required to avoid the risk of conflicting and inconsistent judgments.

We cannot stress this too strongly, because it is the key to the fatal error of the majority opinion.

In the light of this obvious purpose, the Treaty must be interpreted to give effect to this purpose. It must be applied if possible, in such a way that only one court has jurisdiction and only one law of devolution may be applied. An interpretation which permits courts of both Switzerland and the United States to have full contemporaneous jurisdiction *in personam* and *in rem* and permits the laws of distribution of both Switzerland and the United States to regulate the same inheritance, must be rejected.

An interpretation of a Treaty which will render it "null and inefficient" or "vain and nugatory" is inadmissible. It must be interpreted "in such a manner as that it may have its effect". *Geofroy* v. *Riggs,* 133 U.S. 258 (1890) at page 270.

Where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred. *Bacardi Corp.* v. *Domenech,* 311 U.S. 150, 163 (1940); *Hauenstein* v. *Lynham,* 100 U.S. 483 (1879); *Santovincenzo* v. *Egan,* 284 U.S. 30 (1931); *Kolovrat* v. *Oregon,* 366 U.S. 187, 193 (1961).

4. In the face of these rules of interpretation, the majority opinion interprets the Treaty as a "domicile" Treaty, which means that the court of "domicile" has exclusive jurisdiction of the disputed inheritance of the property which was in Switzerland on date of death (the "Swiss property") and the law of that country will apply exclusively to determine the devolution of the Swiss property.

The majority opinion overlooks the fact that such a "domicile" interpretation of Article VI violates both of the applicable rules of interpretation.

As we have noted, the Treaty is unnecessary where there is only one probate, where only one court claims jurisdiction and where all other courts in the Treaty countries decline jurisdiction. There is no conflict of jurisdiction, there are no double probates, no double administrations, no double and inconsistent judgments. There is nothing for the Treaty to resolve.

The Treaty is needed only where there is a conflict between two courts, because of double probate, double administration and double claims of jurisdiction over the same property. This has happened here. Each court claims that the decedent was domiciled in its territory, and that this validates that court's probate, administration and decree with respect to the Swiss property. Both the New York court's opinion (App. pp. 4a, 5a) and the Swiss court's opinion (Rec. A. 157-163, 173) specifically so claim. (See App. p. 4a)

A rule to resolve this unseemly dispute of probates and administrations is desperately needed. If the Treaty rule is "domicile" the Treaty is, by definition, impotent to provide the solution to the impasse. Each court has found that Rougeron was domiciled in its territory under its concept of domicile. If the Treaty is a "domicile" Treaty, then *both* courts have *exclusive* jurisdiction of the Swiss property; *both* probates are *exclusively* valid; *both* laws of inheritance are *exclusively* applicable; *both* antithetical decrees of devolution of the Swiss property are *exclusively* valid. The result is a travesty.

The international impasse, which the Treaty is intended to prevent and resolve, has been created and remains unresolvable. The Treaty is frustrated.

5. To the contrary, a "situs" interpretation of the Treaty permits it to resolve fully the present impasse. If the exclusive jurisdiction of courts is to be determined by the "location" of the disputed property, and if the law of that "situs" is to determine exclusively the inheritance of the disputed property, the New York courts can have no jurisdiction whatever over the property which was in Switzerland at date of death.

Under the New York law of "situs", the property in dispute had its "situs" in Geneva. *Hutchinson* v. *Ross,* 262 N.Y. 381, 390, 187 N.E. 65 (1933); *Houdayer's Est.,* 150 N.Y. 37, 44 N.E. 718 (1896); *Wayatt* v. *Fulrath,* 16 N.Y. (2d) 169, 211 N.E. (2d) 637 (1966) Under the Swiss law of "situs", the property in dispute had its "situs" in Geneva. (Rec. A. 168).

Instead of an unresolvable impasse, which results from the "domicile" interpretation, the "situs" interpretation resolves the impasse fully. It ousts the jurisdiction of the New York courts over the Swiss property; it excludes the application of the New York law of inheritance to the Swiss property. It makes the Swiss decree exclusively applicable to the inheritance of the Swiss property. The Treaty becomes a viable and potent international instrument, rather than a weak and impotent reed.

6. The words of the Treaty are clear and unambiguous. The formula for reconciling conflicts between two courts in cases of disputed inheritances is to fix the jurisdiction at the place where the property in dispute is "located". There may, it is true, be cases in which it may be difficult to determine the place where the property is "located". But this cannot alter the

meaning of the clear words of the Treaty, and convert it into a totally different concept, i.e. one of the "domicile" of the testator.

The Court of Appeals reached its conclusion that the words mean something other than what they say by drawing on the writings of certain commentators. *Miller, Treaties and Other International Acts of the United States of America,* Vol. 5, pp. 869 ff.; *Nussbaum, American-Swiss Private International Law,* 47 Columbia L. Rev. 186 (1947); *Falconbridge, Renvoi in New York and Elsewhere,* 6 Vanderbilt L. Rev. 708 (1953). The Court cited no judicial authority in the United States, either federal or state, because the only court in this country which has ever passed upon this Article held specifically that it was *not* a "domicile" Treaty, but a "situs" Treaty. *Re Schneider's Est.,* 96 N.Y.S. (2d) 652 (1950), rehearing 100 N.Y.S. (2d) 371 (1950). The repudiation of the "domicile" theory appears at 96 N.Y.S. (2d) at pages 656, 660. In the face of this, the majority opinion inexplicably cites *Schneider* as supporting the "domicile" theory (App. p. 6a).

Nor did the Court of Appeals cite any Swiss authority for the "domicile" theory, because the Swiss Federal Supreme Court, in every case which has come before it, has held that the Treaty is a "situs" Treaty, with "situs" to be determined in conformity with the Swiss doctrine of "situs". The Swiss Rougeron judgment (Rec. A. 168) cited and followed the two leading cases, (*re Wohlwend,* 9 B.E. 507 (1883) and *re Gemeinde Feldis,* 24 B.E. 312 (1898). See also *re Michael,* cited in *Gemeinde Feldis* at p. 319).

As to personal property, the Swiss internal law of "situs" is founded on a "fiction" (*Wohlwend, supra,*

at page 516) that personal property has its "situs" at the last domicile of the decedent, under Swiss concepts of domicile. *Ibid.* Therefore, as to personal property, it makes little difference to the Swiss whether the Treaty reads "situs" or "domicile".

However, as to real estate, the Swiss internal law of "situs" places this at the place of its actual location, not at the place of the last domicile of the decedent. Therefore, as to real estate, it is very important in Switzerland whether Article VI means what it says, or whether it means "domicile".

On this, there is no doubt. In *Gemeinde Feldis, supra,* at page 319, citing *Wohlwend, supra,* the Swiss Federal Supreme Court said:

> "Article VI of the aforesaid Treaty gives jurisdiction, in a dispute over an inheritance, to the courts of that country 'in which the property is located.' As the Federal Supreme Court, in the two cited cases, *in re Wohlwend* and *in re Michael,* has specifically adjudicated, this rule of competency means the courts of the last domicile of the decedent in the case of personal property—under the doctrine *mobilia ossibus inhaerent*—and the courts of the place where the land actually lies in the case of real property. . . ."

The Federal Supreme Court is saying, in unambiguous language, that Article VI is *not* a "domicile" article, but a "situs" article and is further stating, in unambiguous language, the internal local Swiss rules of "situs" for both personal and real property.

Accordingly, if this Court, following the principle of *Geofroy* v. *Riggs,* rejects the "domicile" theory in favor of the "situs" theory, in order to make the Treaty viable and effective and capable of resolving the

head-on collision between the Geneva court and New York court, this Court will merely be giving Article VI the same "situs" interpretation as the Federal Supreme Court of Switzerland has consistently given it beginning as far back as 1883.

The commentators, on whom the majority opinion relied, labor hard to convert the phrase "place where the property is located" into the phrase "place of the last domicile of the decedent". They do this by reliance upon some undefined and unwritten "understanding" of the negotiators of the Treaty.

However, the commentators' statement of the "understanding" is directly contradictory to the decisions of the Swiss Federal Supreme Court. *Miller, supra,* (page 869) states that the parties intended that the law of "the country in which the succession is opened" should govern "*all the property* forming part of the estate". *Nussbaum, supra,* copying *Miller* (page 195) states that the parties intended "the control of the law of the last domicile over the *entire inheritance question*".

The difficulty seems to be that neither Miller nor Nussbaum appear to have read *Gemeinde Feldis, supra,* or noticed that the Federal Supreme Court stated unconditionally that no one law under the Treaty, would have control over "all the property" or the "entire inheritance". To the contrary, a different law could apply to real property and to personal property, dependent upon the "situs" of the respective pieces of property.

Falconbridge is troubled by both Miller and Nussbaum. He begins with a frank admission that

> "the treaty specifies the law of the situs as the law governing succession" (p. 729)

and then states that "incredible as it may seem", it means the law of the decedent's domicile, citing Nussbaum as his authority (pp. 729-30, and fn. 68).

What the commentators are all saying, without realizing it, is that they believe that the United States negotiator in 1850 and the United States Senate, in 1855, agreed to adopt, as the "supreme law of the land" in the United States, the 1850 Swiss "fiction" of the "situs" of personal property. There is no word in any document to support such an understanding, which Falconbridge properly describes as "incredible".

8. If we were to assume, for purposes of argument, that the Treaty is a "domicile" Treaty, and that the majority opinion of the Court of Appeals is correct on this point, the case is far from concluded. To the contrary, a whole new series of important problems, relating to the rule of law in international affairs, is raised, all of which the majority opinion ignores.

If Article VI is a "domicile" article, then clearly *both* New York and Geneva have jurisdiction, and perhaps both have *exclusive* jurisdiction, whatever that may mean. The courts of New York have found that Rougeron was domiciled there, under New York concepts of domicile (App. pp. 4a, 5a) and the Courts of Geneva have found that Rougeron was domiciled there, under Swiss concepts of domicile. (Rec. A. 157-163) Each court therefore has jurisdiction over the disputed inheritance under the clear words of the Treaty, if Article VI is a "domicile" article.

The Treaty provides no formula for resolving such a head-on collision which will result from the finding of "double domicile" and "double jurisdiction". A formula does exist, however, in principles of sovereignty and international judicial administration out-

side the language of the Treaty, and which the dissenting judges sustained.

The record is incontestable that the Swiss probate proceedings were the initial probate and that they were started by the widow upon her assertion that Rougeron was domiciled in Geneva on date of death. (Rec. A. 46-55, 96-7) The record is incontestable that the widow, some months later, got conditional physical possession of the Swiss assets entirely through her prosecution of the Swiss probate proceedings. (Rec. A. 190) The record is incontestable that her possession was conditional only, and subject to further proceedings in the pending Swiss proceedings. (Rec. A. 100-2, 190) The record is incontestable that she used this conditional possession *pendente lite* to transport the Swiss property to New York to initiate a second independent probate there. (Rec. A. 34, 128) The record is incontestable that the final decree of distribution of the Geneva Court of Appeals, dated November 4, 1958, awarding the son his statutory share under Swiss law, preceded the final decree of distribution of the Surrogate in New York, dated December 2, 1958, awarding the entire estate, including the Swiss assets, to the widow alone. (Rec. A. 142, 248)

The majority opinion of the Court of Appeals ignored the prior Swiss jurisdiction, the transportation of the Swiss property *pendente lite* and the prior Swiss final decree of distribution.

The three dissenting judges, on the other hand, voiced grave concern over the widow's unilateral action of spiriting the Swiss property to New York and thereby impugning the existing Swiss jurisdiction and the sovereignty of the Swiss courts and frustrating the future Swiss judgment *in personam* against

the widow. They made the point neatly in a single sentence:

> "There is something wrong about allowing the widow to take the law into her own hands so as to change the devolution of this property by taking possession of it in Switzerland, under Swiss legal process, and then removing it to the United States thus thwarting its disposal by the Swiss courts under Swiss law" (App. p. 8a)

This court has stated, in cases involving a dispute between two State courts of the United States, that the managing of a decedent's property is a sovereign right which may not be readily frustrated, and that, absent full faith and credit requirements, the courts of the "situs" may determine the devolution of decedent's personalty which has its "situs" within its borders. *Riley* v. *New York Trust Co.,* 315 U.S. 343 (1942). This Court has also stated that a sovereign has the power to give its courts authority to settle the succession of estates and to determine finally as against all the world all questions which arise therein. *Tilt* v. *Kelsey,* 207 U.S. 43 (1907).

This Court has also stated, in cases involving a dispute between two State courts or between a State and a Federal court that the administration of property in the possession of one court of competent jurisdiction, cannot be disturbed by process out of another court. *Byers* v. *McAuley,* 149 U.S. 608 (1893); *State of Iowa* v. *Slimmer,* 248 U.S. 115 (1918); *Riley* v. *New York Trust Co., supra; Peck* v. *Jenness,* 48 U.S. 612 (1849).

Finally, this Court has stated, over a period of more than one hundred years, in cases between two State courts and between a State court and a Federal court, that where two courts independently have jurisdiction

over a *res*, specifically including administration of decedent's estates, the court which first acquires jurisdiction over the property is entitled to administer it to the exclusion of all other courts. *Princess Lida of Thurn & Taxis* v. *Thompson*, 305 U.S. 456 (1939); *Byers* v. *McAuley, supra; Yonley* v. *Lavender*, 88 U.S. 276 (1874); *Taylor* v. *Carryl*, 61 U.S. 583 (1857), citing Lord Ellenborough in *Payne* v. *Drew*, 4 East. 523 for the governing rule; *Hagan* v. *Lucas*, 35 U.S. 400 (1836). Chief Justice Taney in *Taylor, supra*, at p. 607, refers to this as a rule which is "universally recognized". See also *Williams* v. *Benedict*, 49 U.S. 107 (1850), where the property under administration by the Orphans' Court of Mississippi was held to be *in gremio legis* and exempt from the orders of any other court.

However, this Court has never ruled specifically whether these basic principles of "international" law are applicable to a dispute between a court of the United States and a court of a friendly foreign country. If the majority opinion of the Court of Appeals remains unreversed, the first and only United States authority on these matters will lay down the rule that none of these principles of judicial sovereignty and judicial administration are applicable to the jural relations between the United States and friendly foreign countries.

9. In the recent decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), this Court disapproved the concept that the unilateral action of a party to litigation, in the form of "self-help", could change the jural relations in an international matter. As this Court said, sustaining such "self-help" would be "hardly conducive to a peaceful international

order". This is no new doctrine, having been specifically stated by Mr. Justice Holmes in an interstate decedent's estate case in *Overby* v. *Gordon,* 177 U.S. 214 (1900).

Yet this is exactly what has happened in this case, a point which the majority opinion ignores and which the dissenting opinion stresses.

If the Swiss property had remained in Geneva until the final decree of distribution in the pending Swiss probate proceedings initiated by the widow, the Surrogate in New York could never have demanded that the Swiss property be removed from Geneva and transported to New York; nor could the New York court have entered any order binding the *res* already under Swiss administration; *Byers* v. *McAuley, supra; State of Iowa* v. *Slimmer, supra; Riley* v. *New York Trust Co., supra.* And when the Geneva court had entered its final decree of distribution *in personam* and *in rem,* that decree would have been *res judicata* of the distribution of the Swiss property. *Grant* v. *Buckner,* 172 U.S. 232 (1893); *Tilt* v. *Kelsey, supra; Hilton* v. *Guyot,* 159 U.S. 113 (1895).

Yet the majority opinion of the Court of Appeals sanctions the exact opposite conclusion, by validating the effect of the "self-help" transportation of the property by the widow to New York *pendente lite,* after she obtained conditional possession of the property as the result solely of the Swiss proceedings which she initiated. The dissenting judges vigorously disagreed (App. pp. 8a, 9a).

10. This Court has recognized "comity" as an important principle of the recognition of final judgments rendered by courts of other civilized countries. *Hilton* v. *Guyot, supra.*

The final decree of distribution of the Court of Appeals of Geneva, a judgment *in personam* and *in rem* in favor of Petitioner and against the widow (Rec. A. 142), was entered prior to the antithetical decree of distribution of the Surrogate against the Petitioner and in favor of the widow. (Rec. A. 248) The Geneva probate proceedings had preceded the New York probate proceedings by almost exactly one year. (Rec. A. 34, 42).

The majority opinion ignores the application of the rule of *Hilton* v. *Guyot;* the three dissenting judges refer specifically to "a suitable respect for the decrees of other civilized countries". (App. p. 9a)

11. The clash between the four majority judges and the three dissenting judges in the Court of Appeals presents diametrically opposed opinions on four questions of international law never adjudicated by this Court in any previous case.

(a) To what extent do the rules of "international" law, applicable to disputes between the courts of two States of the United States, over the administration of a decedent's property, apply to a dispute between a court of the United States and a court of a foreign country?

(b) To what extent do the rules of jurisdiction of courts, where more than one court in the United States has jurisdiction over some part of a decedent's assets, apply to jurisdiction between a court of the United States and a court of a foreign country?

(c) To what extent may a party to the administration of a decedent's estate in a foreign country, frustrate the sovereignty of the court which

is actually administering certain property physically before it, by physically transporting that property by "self-help" to a forum in the United States?

(d) To what extent is the judgment of a foreign tribunal, distributing personal property physically within its territory on the date of a decedent's death and voluntarily submitted to it for administration, conclusive and binding in the United States under the doctrine of comity?

All these basic principles—that of refusing jurisdiction over property already under administration in another court; that of abstaining from interference with the sovereignty and jurisdiction of another court; that of recognizing the final judgments of another competent court; and that of denying any party the right, by "self-help" remedies, to alter the jural relations between courts and between nations—are under attack in this case.

If the majority opinion of the Court of Appeals remains the definitive statement of the applicable principles in truly "international" disputes between courts, it will validate the effectiveness of "self-help" by a party to pending litigation in impugning the sovereignty and jurisdiction of courts, in frustrating judgments *in personam* and *in rem*, and in preventing a "peaceful international order" in civil litigation.

Resort to such "self-help" as the widow exercised here renders the recognition of sovereignty (with or without a Treaty) meaningless and the quest for a peaceful international judicial order in civil matters fruitless. If the condonation of "self-help" by the majority opinion remains unreversed, it would be

difficult to conceive of any stage of an international judicial proceeding which would hereafter be immune from the potential chaos of a "self-help" act by one of the parties.

We submit that the majority opinion of the Court of Appeals is a serious blow to all present efforts to create the rule of law in international affairs. The rule announced by the three dissenting judges would buttress those efforts substantially.

12. The key to this cause is the admission in the majority opinion that the Swiss courts adjudicated Rougeron's domicile to be in Switzerland while the New York courts adjudicated the domicile to be in New York. (App. pp. 4a, 5a) Then the majority opinion ignores this fundamental fact which has created the irreconcilable and unseemly conflict between the two tribunals.

The four majority judges permit the conflict of domicile and jurisdiction to be resolved by "self-help". They hold that the spiriting of the *res* out of one country into the other, by one of the parties, is the way in which the conflict should be resolved.

The three minority judges find this intolerable. They suggest that the proper rule must be that the tribunal whose jurisdiction over the *res* and the parties first attaches must be the tribunal whose exclusive power of adjudication over the *res* must be recognized by the other. Cf. *Overby* v. *Gordon, supra,* at pages 228-9. This is to be recognized, say the minority judges, either by the second court denying its own jurisdiction over the *res* or by the device of directing the party who has removed the property to return it to the court where the jurisdiction first attached. (App. pp. 8a, 9a)

CONCLUSION

Petitioner submits that the 4-3 decision of the Court of Appeals presents an appropriate and important case for this Court to review.

First, it requires the interpretation of a provision of a Treaty of the United States never before interpreted by this Court.

Second, it requires a definitive statement of the basic rules of international jural relations between a court of the United States and a court of a foreign country in civil litigation in the administration of a decedent's estate.

Third, it presents questions important to the development of a "peaceful international order" and the "rule of law" in international affairs.

For the reasons set forth in the Petition, it is respectfully requested that a writ of certiorari be granted.

Respectfully submitted,

PHILIP W. AMRAM
700 Colorado Building
Washington, D. C. 20005

AMRAM, HAHN & SUNDLUN
Of Counsel

APPENDIX

Opinion, Judgment and Dissenting Opinion of Court of Appeals

In the Matter of the Estate of MARCEL J. ROUGERON, Deceased. JULES J. ROUGERON, Appellant; JEANNE A. ROUGERON, Respondent.

Decided May 5, 1966.

Chief Judge DESMOND. Petitioner-appellant, born in France in 1903 and a life-long citizen and resident of that country, was an acknowledged illegitimate son of Marcel J. Rougeron, a native of France, born in 1875, who became an American citizen in 1926 and who died in Switzerland on April 15, 1954, leaving a will which gave his entire estate to his widow, the respondent herein, who was of French birth and whom the deceased had married in Chicago in 1937 and who is now about 86 years old. Just before his death the testator had been living in a home he owned in a Swiss village in the Canton of Geneva. The Appellate Division order which is on appeal here affirmed a denial by the New York County Surrogate's Court of petitioner's 1961 application to vacate or reopen the 1957 decree of that court admitting the will to probate and to vacate or reopen a 1958 decree which had settled the account of the administrator *c. t. a.* and had directed distribution of the net estate to respondent widow.

Summarized, appellant's position is this: that because at death decedent had personal property in his possession in Switzerland (besides other personalty in New York City) the succession thereto is by a Swiss-United States treaty of 1850 hereafter discussed, to be decided by the Swiss courts according to Swiss law, that the New York courts, therefore, had no subject-matter jurisdiction, that under Swiss law petitioner would be entitled to a statutory share (a little more than half) of that property, and that the New York courts had no right to assume jurisdiction as to the property which was actually in Switzerland at

the time of death and had its situs there but was soon afterwards brought to New York by the widow who then commenced the probate proceedings in New York. While conceding that he took part in the New York probate proceedings and litigated the question of domicile there decided against him, petitioner argues that the New York outcome is not conclusive against him since, so he asserts, neither petitioner nor the Surrogate knew at that time that decedent held property in Switzerland which, as petitioner reads the treaty, had to be administered by the Swiss courts according to Swiss law. Petitioner points out that he was not made a party to the accounting proceedings, presumably because on probate he had already been barred from any share in the estate.

A summary of respondent's position is: that the 1957 probate decree is conclusive against any claim of petitioner since he was cited and appeared in that proceeding and filed objections to the assumption of jurisdiction by the New York County Surrogate's Court, the ground of petitioner's objections at that time being his assertion that decedent had been domiciled in Switzerland, not New York, and that the treaty protected petitioner's right of inheritance. Respondent argues, therefore, not only that petitioner's alleged rights were defeated by the probate decree, but that petitioner had no such rights since, as respondent reads it, the Swiss-American treaty applies Swiss law to personal property of Swiss domiciliaries or nationals only and that, in fact and as determined by the probate decree, decedent was a United States citizen sojourning in Switzerland to whose personalty, wherever situated, Swiss law did not apply under the treaty or otherwise.

Before going to other law questions presented, we must pass on questions as to our jurisdiction over this appeal. Petitioner's appeal from so much of the order below as refused to vacate the probate must be dismissed for nonfinality. However, the other part of the order appealed

from (the part denying vacatur of the settlement of the account) is final and appealable as to petitioner since he had not been made a party to the accounting proceeding (Cohen and Karger, Powers of the New York Court of Appeals, p. 188). Also, the appeal can lie from that latter part of the order although it is from a unanimous affirmance, since there is a constitutional question raised by petitioner's arguments as to the treaty (*Matter of Rougeron*, 16 N.Y. 2d 882).

The Surrogate's decision which denied vacatur of the two decrees did not involve any consideration of the treaty or of proceedings in the Swiss courts now to be discussed herein. The Surrogate held that, since the probate decree which expressly barred petitioner from participation in the estate had become final without appeal, petitioner was incapable of objecting to the final account and order of distribution.

But petitioner calls attention to court proceedings and orders and judgments in Switzerland. Two weeks after her husband's death the widow and a notary filed in the appropriate Geneva tribunal an inventory of her husband's estate. This document described the decedent as having been domiciled in Geneva and listed, as his assets located in Switzerland at his death, cash and various corporate stocks, also mentioning that decedent had deposit accounts in several New York banks. Four months later the widow (again ex parte) obtained from a Swiss court (Justice of the Peace) a "preliminary Certificate of Heirship" certifying that the widow was the sole heir of decedent and of his whole estate. Although the issue is not fully briefed, it seems undisputed that the Swiss certificate would ordinarily stand in Switzerland as evidencing a "common" or "simple" form of probate, to stand unless and until a formal contest should be filed (see 95 C.J.S., Wills, § 318). In January, 1955 petitioner in a Swiss court asked for a sequestration order which was granted, but an appellate

court reversed and denied relief, apparently because of lack of jurisdiction in the Swiss tribunals. In April, 1955 the widow filed in New York the probate petition above described and which resulted in a decree made after a trial that petitioner had no interest in the estate. Meanwhile as we have said, the property which decedent had with him in Switzerland when he died had been removed by the widow to New York, several months after death.

After petitioner's first Swiss lawsuit had failed he commenced (before the New York probate) another action or proceeding in a Swiss court which was decided against him on the merits in April, 1958. On appeal, however, he was successful, obtaining in November, 1958 a decree of the Court of Appeals of Geneva which adjudged that the estate was under the treaty governed by the Swiss law, and that the Swiss courts have exclusive jurisdiction as to any dispute arising in the estate. This decree granted petitioner a "statutory compulsory share" (apparently 9/16ths) in the estate and ordered the widow to pay him that share and to furnish him full information as to the property in the estate. This Swiss decree included a declaration that "the concept of domicile must be determined in accordance with the lex fori", that is to say in accordance with Swiss law and not in accordance with American concepts, and a finding that "deceased at the time of his death was actually domiciled in Geneva".

Petitioner's sole reliance is on the Swiss-United States treaty of 1850 and its article VI which reads: "Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated." This language, argues petitioner, requires us to hold that the personal assets of deceased, which were in Switzerland when he died, must be distributed according to Swiss law, even though deceased was a United States citizen and even though it has been held by a Surrogate's decree handed down after

a contest in which petitioner took part, and not appealed from, that deceased was a New York domiciliary.

Respondent, while disagreeing with petitioner as to the meaning and applicability of the treaty (and calling to our attention that petitioner pleaded this same treaty as a basis for relief to him in the probate proceedings), takes her stand firmly on the proposition that the unappealed New York Surrogate's decree directing probate of the will on a finding after testimony taken that decedent had his domicile in New York is a complete bar to any demand or claim of petitioner (*Cromwell* v. *County of Sac*, 94 U.S. 351, 353; *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 306; *Ripley* v. *Storer*, 309 N.Y. 506, 515). And, respondent points out, this applies generally as against attempts to relitigate jurisdictional questions as well as other kinds of issues (*Baldwin* v. *Traveling Men's Assn.*, 283 U.S. 522, 525; *Davis* v. *Davis*, 305 U.S. 32; *Williams* v. *North Carolina*, 325 U.S. 226, 230; see *Vander* v. *Casperson*, 12 N.Y. 2d 56). But the meaning and application of a treaty is still a question of law which if decided erroneously must be reviewed on appeal, otherwise the judgment is conclusive.

It is the rule that subject-matter jurisdiction otherwise nonexistent may not come into being through waiver or estoppel (*Matter of Newham* v. *Chile Exploration Co.*, 232 N.Y. 37). However, there is a well-settled exception or proviso that this does not apply when the court had jurisdiction of the general subject matter but a contention is made after judgment that the court did not have power to act in the particular case or as to a particular question in the case (*Moore* v. *McAllister*, 216 Md. 497; *Taylor Coal Co.* v. *Industrial Comm.*, 301 Ill. 381; *Lambert* v. *Yellowley*, 4 F. 2d 915; *United States* v. *Ellison*, 74 F. 2d 864). In other words the rule that subject-matter jurisdiction cannot be born of waiver, consent or estoppel has to do with those cases only where the court has not been given any power to do anything at all in such a case, as where a

tribunal vested with civil competence attempts to convict a citizen of a crime. In other words, "subject matter" does not mean "this case" but "this kind of case" (cf. *Matter of Newham* v. *Chile Exploration Co.*, 232 N.Y. 37, 42, *supra*). The Surrogate's Court of New York County had general subject-matter jurisdiction as to probate of wills and as to the probate of the will of this decedent who had a residence in New York and property there. Petitioner never really took a position different from this in the Surrogate's Court (he asked the court to rule that the will was "invalid") although he now tardily asserts that the Surrogate's jurisdiction extended only to entering an order against the respondent and directing her to return the property to Switzerland and to the Swiss courts. The petitioner seems to be arguing also that he should not be charged with estoppel or waiver because, so he intimates, he did not know that valuable property of the estate had been taken from Switzerland to New York. The record before us, however, proves conclusively that petitioner did know this fact at the time of this New York probate.

We turn to the treaty and petitioner's argument that article VI is to be taken with all literalness when it says that: "Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated." Petitioner says that this means that a controversy like the present one must be decided not only according to the laws of Switzerland but by the courts of Switzerland. The only known writings on the subject, four in number, all say in one way or another that the language of article VI does not require that questions as to succession or inheritance must be decided pursuant to the law and by the judges of the country (Switzerland or the United States) in which personal property happens to be physically located at the moment of death (*Matter of Schneider*, 198 Misc. 1017; Nussbaum, American-Swiss Private International Law, 47

Col. L. Rev. 186, 195 *et seq.*; Vanderbilt L. Rev., Vol. 6, pp. 729-730; Miller, Treaties and Other International Acts of the United States of America, published by the United States Department of State, Vol. 5, Discussion of art. VI at p. 869). All these in one way or another confirm that as to personal property legal domicile at death determines what law is to be applied and what court has jurisdiction. Particularly interesting is Miller's work which is an official publication of the United States Department of State. Author Miller has given us a complete history of the 1850 treaty. Material at page 869 of his Volume 5 shows that it was recognized during the treaty negotiations that a literal application of article VI would produce the absurd and undesired effect that if a decedent to whose estate the treaty applied left personal property in both Switzerland and the United States proceedings would be required in both countries with obvious difficulty, delay and expense. As a result of these comments and discussions between the diplomatic representatives of the two countries, narrated by author Miller, the treaty's language was not changed but there was apparent recognition that the only proper interpretation was that jurisdiction would be in the courts and place of the decedent's legal domicile. Furthermore, as appears from the Miller text, an earlier draft of article VI specified that the article would apply to both real and personal property, but this was stricken out. The deletion apparently was made because it was recognized that jurisdiction was not to be reposed solely in the courts of the place where the property was physically present (Miller, *op. cit.*, vol. 5, pp. 892-893, 899-903). Thus, when petitioner came into and took part in the New York County probate proceedings he himself was recognizing the application under the treaty of the conventional domiciliary rule as to personal property.

That part of the order appealed from which affirms the denial of the application to vacate the probate should be

dismissed for nonfinality, otherwise the order appealed from should be affirmed, with costs.

VAN VOORHIS, J. (dissenting). This is an unusual situation, where the Swiss courts have decided that the decedent was domiciled in Switzerland, and the New York Surrogate's Court that he was domiciled in this country. As an acknowledged illegitimate son, appellant would be entitled to inherit under Swiss law; contrariwise under the law of New York State. It has been held that appellant is estopped by the order of the Surrogate admitting the will to probate in New York County, on the basis that the deceased was a New York State domiciliary when he died. Appellant appeared and contested the probate on the ground that decedent had been domiciled in Switzerland and not in New York. He was held not to be a party in interest, and was not thereafter cited when it came to the executor's accounting and the distribution of the assets. Insofar as concerns assets having a situs in New York State at the time of death, I have no question that the decision is correct. Upon the other hand, there is something wrong about the disposition of the Swiss assets, which were obtained by the widow in Switzerland as a result of Swiss legal proceedings, and were then brought by her to New York after her husband's death. If they had been left in Switzerland, they would have been distributed in accordance with the Swiss decree so that the son would have inherited his share under Swiss law. There is something wrong about allowing the widow to take the law into her own hands so as to change the devolution of this property by taking possession of it in Switzerland, under Swiss legal process, and then removing it to the United States thus thwarting its disposal by the Swiss courts under Swiss law. The decedent has been held by the Swiss courts to have been domiciled there, not here, and fairness and reason require a determination either that the Surrogate lacked jurisdiction to dispose of them, or that the Surrogate should be required to remit them to Switzerland to be

disposed of under the Swiss decree. The situs of investment securities has been held to be a factor of determinative importance (*Wyatt* v. *Fulrath*, 16 N.Y. 2d 169), and the widow should not be allowed unilaterally to decide the choice of law by leaving the securities in Switzerland or bringing them to the United States, and thus to determine whether they are to be distributed under the conflicting Swiss or New York decrees. Appellant is not estopped by the admittance of the will to probate in New York, inasmuch as it might very well be admitted here to dispose of the New York assets. But a suitable respect for the decrees of other civilized countries would not empower the New York County Surrogate to dispose of assets which would be distributed under the Swiss decree except for the fact that the widow has changed their situs to this country to suit her own advantage. Appellant was not a party to the judicial settlement proceedings, and no one contends that he is estopped by the decree of distribution. The order appealed from ought to be reversed or, at least, modified so as to return the Swiss assets to Switzerland, where they were when decedent died, to be administered in that jurisdiction.

Judges Fuld, Burke and Bergan concur with Chief Judge Desmond; Judge Van Voorhis dissents in an opinion in which Judges Scileppi and Keating concur.

Appeal from order, insofar as it affirms the order denying the application to vacate the probate decree, dismissed for non-finality; in all other respects, order affirmed, with costs.

Notice of Appeal to the Court of Appeals

SURROGATE'S COURT OF THE COUNTY OF NEW YORK

File No. P1396-1955

In the Matter of the Application to Open, Vacate and Set Aside a Decree of this Court Granting Letters of Administration with the Will Annexed on the Estate of Marcel J. Rougeron, Deceased.

JULES JEAN ROUGERON, *Petitioner-Appellant,*

v.

JEANNE A. ROUGERON, *Respondent-Respondent.*

NOTICE OF APPEAL TO THE COURT OF APPEALS

Sirs:

PLEASE TAKE NOTICE that the Petitioner-Appellant above named, hereby appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of the said Appellate Division on the 8th day of July, 1965, which unanimously affirmed the judgment of the Surrogate's Court of the County of New York in the above entitled proceeding, entered in the office of the Clerk of the Surrogate's Court on the 28th day of May, 1963, which denied Petitioner's Petition to set aside, open and vacate a decree of December 2, 1958 settling the account of the administrator c.t.a. and the Petitioner appeals from each and every part of the said Order of the Appellate Division, as well as from the whole thereof.

Petitioner-Appellant claims the right to appeal as of right under sub-division 1(a) of C.P.L.R. § 5601, by rea-

son of the fact that the order of the Appellate Division finally determined a proceeding in which there is directly involved the construction of the Constitution of the United States as follows:—

(a) The impact of the Swiss-United States treaty of 1850 and the Supremacy Clause (Art. VI clause 2) of the Constitution upon the jurisdiction over the subject matter of the Surrogate's Court to administer and distribute the assets of a decedent which were in Switzerland on date of death and which were physically removed from Switzerland to New York for administration after his death.

(b) If the Surrogate's Court has such jurisdiction, the impact of the treaty and the Supremacy Clause upon the choice of the law to be applied by the Surrogate (i.e., the law of New York or the law of Switzerland) in the distribution of the assets of the decedent which were in Switzerland on date of death and which were physically removed from Switzerland to New York for administration after his death.

(c) The impact of the constitutional doctrine of *Pink* v. *United States,* 315 U.S. 203 (1941) upon the adjudication by the courts of this State of questions of foreign law on which the federal rights under the treaty and the Supremacy clause may depend.

(d) The power of the Surrogate's Court to ignore the Treaty and its provisions for jurisdiction over the subject matter and choice of law by the invocation of local New York rules of procedure, e.g., the alleged existence of res judicata, and thereby to create jurisdiction over the subject matter and to choose New

York law rather than Swiss law in violation of the treaty and the Supremacy Clause.

Dated: New York, N.Y.
August 3, 1965

Yours, etc.

GUGGENHEIMER & UNTERMYER
80 Pine Street
New York, New York
DI 4-2040

PHILIP W. AMRAM
944 Washington Building
Washington, D. C. 20005
ST 3-3344

Attorneys for Petitioner-Appellant

AMRAM, HAHN & SUNDLUN
Of Counsel

To:

Clerk of the Surrogate's Court of the County of New York
Hall of Records
New York, New York

Kelley, Drye, Newhall, Maginnes & Warren, Esqs.
350 Park Avenue
New York, New York
PL 2-5800

Attorneys for Respondent-Respondent

Order of Affirmance of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 8th day of July, 1965.

Present:

Hon. Charles D. Breitel,
Justice Presiding,
" Benjamin J. Rabin,
" James B. M. McNally,
" Harold A. Stevens,
" Samuel W. Eager,
Justices.

9038, 9039, 9040.

In the Matter

of

The Application to open, vacate and set aside a decree of this Court granting letters of administration with the Will annexed on the Estate of Marcel J. Rougeron, Deceased.

Jules Jean Rougeron, *Petitioner-Appellant,*

v.

Jeanne A. Rougeron, *Respondent-Respondent.*

An appeal having been taken to this Court by the petitioner-appellant from an order of the Surrogate's Court, New York County, entered on the 28th day of May, 1963, denying petitioner's application to vacate or reopen the decree granting probate, the order dismissing objections and the decree settling account of the Administrator, C.T.A., and said appeal having been argued by Mr. Philip W. Amram of counsel for the appellant, and by Mr. Bud G. Holman of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $30 costs and disbursements to the respondent.

Enter:

s/ FRANK H. CRABTREE
Clerk

Statement of Questions Involved in the Appellate Division

(1) Should a Surrogate open a decree of distribution under the following facts? A United States citizen, domiciled in New York, dies in Switzerland, having substantial personal property with its situs in that country. His widow initiates administration of the Swiss property in the Swiss courts. While these proceedings are pending, the widow physically removes the property from Switzerland to New York and presents it to a New York Surrogate's Court for administration, without disclosure of the Swiss situs on the date of death or of the removal of the properties to the United States while the Swiss proceedings were pending. The Swiss Court of last resort later enters its final decree of devolution and distribution of the property under Swiss law, awarding part of it to the widow and part to another beneficiary. Thereafter, the widow, without disclosure of the then existing Swiss final decree and giving no notice to the other beneficiary, secures from the New York court an independent decree of devolution and distribution under New York law of the assets which had a Swiss situs on date of death, entirely in her own favor, and totally different from the earlier Swiss decree. The court below declined to answer this question.

(2) Under the facts set forth in (1) above:

(a) Under the Swiss-United States Treaty of 1850 has the Surrogate's Court in New York any competence or jurisdiction whatever to administer or dis-

tribute the assets of the decedent, which had their situs in Switzerland on date of decedent's death and which were brought to New York after death?

(b) If the New York courts have any competence or jurisdiction under the Treaty, may they distribute such assets under any law other than Swiss law?

(c) If the New York courts have any competence or jurisdiction under the Treaty, may they distribute such assets in a manner contrary to a pre-existing and outstanding final judgment of the court of last resort of Switzerland, which specifically distributes this particular property?

(d) Is a decree of the New York courts, awarding and distributing the Swiss assets contrary to Swiss law and contrary to the pre-existing and outstanding judgment of the court of last resort of Switzerland, void on constitutional grounds, as a violation of the Treaty and the law of the land?

The court below declined to answer any part of this question.

(3) Was the decree of the Surrogate of May 16, 1957, in this estate, granting letters of administration and adjudicating that appellant herein had no interest in the New York assets of this estate under New York law and therefore no right to object to probate, *res judicata* of the right of the appellant, under the Swiss-United States Treaty of 1850, to share in the distribution of the assets of the estate which had their situs in Switzerland on date of death and which were removed to New York after the decedent's death? Answered "yes" by the court below.

Decision and Opinion by DiFalco, S.

New York Law Journal—February 4, 1963

SURROGATE'S COURT.

By Mr. Surrogate DiFalco.

Estate of Marcel J. Rougeron—This is an application by a person claiming to be an acknowledged son of the decedent for an order vacating this court's decree of May 17, 1957, admitting his father's will to probate. That decree recited the fact that the present petitioner's objections to the probate of the propounded instrument had been dismissed by an order dated March 19, 1957, upon the ground that he had been found as a matter of law to have no interest in the estate (*Matter of Rougeron*, N. Y. L. J. March 11, 1957).

Following the filing of the answer of the administrator c.t.a. the movant on this application abandoned his attack upon the decree admitting the will to probate stating in the memorandum submitted by him in reply to the brief of the respondent, "The entirety of our Main Memorandum dealt with one issue only. As set forth in our Conclusion, we ask this Court to 'vacate, set aside and nullify the decree of December 2, 1958.' This is the decree of *distribution* entered nearly two years after the disputed probate. We made it unanswerably clear in the Main Memorandum that *we make no attack whatever on the decree of probate of May 16, 1957*. We are satisfied that the decree of probate was proper. We attack in this proceeding *only* the decree of *distribution* and only the adjudication of the *devolution* of that property which had its situs in Switzerland on date of death. (See Main Memo., pages 89-91.)" (Italics in original.)

The decree of December 2, 1958, had settled the account of the administrator c.t.a. in a proceeding instituted for the purpose without notice to the moving party.

The court will address itself to the merits of the petitioner's application and overlook the fact that the relief that he now seeks represents a total change of position from that which he had originally assumed in initiating this proceeding bearing the caption "in the matter of the application to open, vacate, and set aside a decree of this court granting letters of administration with the will annexed."

The petitioner states it to be his present purpose to invoke the Swiss United States Treaty of 1850 said by him to confer exclusive control over the personal property left by the decedent upon the courts of its situs which he asserts to be Switzerland, thus ousting this court of the jurisdiction it had exercised in making the decree directing distribution.

The state of the record of the administration of this estate being what it is, however, it is perfectly obvious that the moving party is barred by the decree of May 16, 1957, and the order of March 19, 1957, from invoking the jurisdiction of this court to set aside the decree entered in the proceeding for the settlement of the account in the administrator c.t.a. Having allowed the decree which held him to be without any interest in this estate to become final without appeal, the petitioner was obviously incapable of objecting to the account of the fiduciary filed thereafter. In apparent recognition of the situation the administrator c.t.a. in the proceeding for the settlement of its account quite properly omitted to cite the moving party as a respondent for the question of his right to participate in matters affecting the estate had already been clearly resolved against him. Lacking any interest in the estate he is not now entitled to an order setting aside and nullifying the decree settling the account. A situation almost identical to that here confronted Mr. Surrogate Delehanty in *Matter of Edward W. Browning* (N. Y. L. J., Sept. 1, 1939). There an attempt was made by the adopted daughter of the decedent's first wife to interpose objections to the account.

It had previously been held in the proceeding for probate of his will that the claimant had no interest in the estate of the decedent. The court said on a motion to dismiss her objections in the accounting proceeding, "It was obvious that her position as objectant in the accounting was untenable since she was barred by the decree theretofore entered. Accordingly, her objection was dismissed as matter of law" (see also *Matter of Browning*, 153 Misc. 564).

Section 262 of the Surrogate's Court Act prescribes the persons who must be cited on a proceeding for the settlement of the account of a fiduciary in this court. Neither in that section nor in Section 259 which lists the persons who may institute a proceeding for a compulsory accounting is there to be found any authority which would permit the moving party to have intervened in the accounting which resulted in the decree he attacks in his memorandum. The principle is illustrated in *Matter of McGoughran* (124 App. Div. 312 [1st Dept.]), in which objections to the account of the administrator interposed by a woman claiming to be the widow of the decedent were dismissed for the reason that her status had theretofore been denied on her application to vacate the decree granting letters of administration. The Appellate Division adopting the reasoning of the court below cited the Surrogate's decision in its own opinion at page 315 stating: "The issue as to whether the objectant was the widow of the decedent was tried before me and was determined adversely to her contentions in the proceeding in this court commenced by her to set aside letters of administration granted on a petition which alleged that he died unmarried. My decree made in that proceeding was a final decree in a special proceeding and not the mere decision of a motion and it operated as a bar and an estoppel on her."

It is not to be thought that the movant is deprived by the ruling here made of the opportunity that had been his to challenge the court's jurisdiction which he had

initially attacked in the probate proceeding. He failed to appeal from the decree which denied him the relief he then sought and having been found to be without any interest in this estate he will not now be "permitted to involve * * * (the) estate in expensive litigation upon a bare assertion of interest" (*Matter of Aims*, 199 Misc. 188). To like effect see *Matter of Cullen* (163 Misc. 410 [Delehanty, S.]); *Matter of Crum* (98 Misc. 160, 180); *Matter of Sherman* (134 N. Y. S. 2d 399); *Matter of Goldsticker* (192 N. Y. 35, esp. at p. 41), where it was said: "Of course, if a decree cannot be assailed in any other tribunal equally it cannot be assailed in a different litigation before the same tribunal" (*Matter of Donaldson*, 165 Misc. 661; *Matter of Leverich*, 135 Misc. 774; *Matter of Cook*, 244 N. Y. 63; *Matter of Cohen*, 12 Misc. 2d 784). For the reasons stated and upon the authority of the cases cited this application, whether it be regarded as a motion to reopen the decree of May 16, 1957, admitting the will to probate, the order of March 19, 1957, dismissing the objections of the moving party as a person not interested in the estate, or the decree dated December 2, 1958, settling the intermediate account of the administrator c.t.a., is in all respects denied. Submit order on notice.

At a Surrogate's Court, held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City, County and State of New York, on the 31st day of May, 1966

PRESENT: HON. S. SAMUEL DIFALCO

SURROGATE

(Filed June 6, 1966)

File No. P1396-1955

In the Matter of the Application to open, vacate and set aside a Decree of this Court granting Letters of Administration with the Will annexed of the Estate of Marcel J. Rougeron, Deceased.

Order on Remittitur

An appeal having been taken to the Court of Appeals in the State of New York from an order of the Appellate Division of the Supreme Court in and for the First Judicial Department, made on July 8, 1965, and entered on said date in the office of the Clerk of said Appellate Division, which unanimously affirmed the order of the Surrogate's Court, New York County, made on May 24, 1963, and entered on May 28, 1963, in the office of the Clerk of said Surrogate's Court;

And the matter having thereafter duly come on to be heard and argued before the Court of Appeals of the State of New York, and an order having been duly made and entered by said Court on May 5, 1966, dismissing the appeal from said order of said Appellate Division for non-finality, insofar as it affirms the said order of the said Surrogate's Court denying the application to vacate the probate decree, and in all other respects affirming said order of said Appellate Division, with costs, and a certified copy of said order of said Court of Appeals, together with the papers upon which the said appeal was heard, having been duly transmitted to this Court and filed on May 16, 1966;

Now, on motion of Kelley Drye Newhall Maginnes & Warren, attorneys for the respondent Jeanne A. Rougeron, it is

ORDERED, ADJUDGED AND DECREED that the order of the Court of Appeals of the State of New York, made and entered, as aforesaid, on May 5, 1966, dismissing the order of the Appellate Division of the Supreme Court appealed from, insofar as it affirms the order denying the application to vacate the probate decree, and in all other respects affirming said order of said Appellate Division, be and the same hereby is made the order of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the respondent, Jeanne A. Rougeron, recover from the petitioner, Jules Jean Rougeron, costs to be taxed in the amount of $570.73.

S. SAMUEL DIFALCO
Surrogate

LIBRARY

Office-Supreme Court, U.S.
FILED
SEP 27 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 386

IN THE MATTER OF

THE APPLICATION TO OPEN, VACATE AND SET ASIDE A DECREE OF THE SURROGATE'S COURT GRANTING LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED ON THE ESTATE OF MARCEL J. ROUGERON,

Deceased,

JULES JEAN ROUGERON,

Petitioner-Petitioner,

against

JEANNE A. ROUGERON,

Respondent-Respondent.

On Petition for Writ of Certiorari to the Court of Appeals State of New York

BRIEF IN OPPOSITION

FRANCIS S. BENSEL
BUD G. HOLMAN
Counsel for Respondent-Respondent
350 Park Avenue
New York, New York 10022

KELLEY DRYE NEWHALL MAGINNES & WARREN
Of Counsel

INDEX

	PAGE
OPINIONS BELOW	1
QUESTION PRESENTED	2
NATURE OF THE CASE	2
ARGUMENT	
I—Petitioner litigated to a concededly final determination the question of whether he has an interest in this estate in the first New York proceeding. He argued the treaty in that proceeding. The fact that he seeks now to urge another interpretation of that same treaty does not give him the right to relitigate. Nor does it raise a federal question, *res judicata* being an adequate state ground for decision	11
II—There is nothing wrong or novel in the decisions below that the entire estate passed to the widow pursuant to the express terms of the will	19
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:

Allen v. Arguimbeau, 198 U. S. 149, 154-155 (1905)	17
Baldwin v. Iowa State Travelling Men's Assn., 283 U. S. 522, 525 (1931)	13
Matter of Barandon, 41 Misc. 380 (Surr. Ct., N. Y. Co., 1903)	25
Matter of Batsholts, 188 Misc. 807 (Surr. Ct., N. Y. Co., 1946)	24

PAGE

Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 29-30 (1917) 13
Consol. Turnpike v. Norfolk etc. Ry. Co., 228 U. S. 596, 599 (1913) 18
Cromwell v. County of Sac, 94 U. S. 351, 353 (1876) 13
Cuyahoga Power Co. v. Northern Realty Co., 244 U. S. 300, 303-304 (1917) 18

Davis v. Davis, 305 U. S. 32, 43 (1938) 13
DeSaussure v. Gaillard, 127 U. S. 216, 234 (1888) 18

Ennis v. Smith, 55 U. S. 251, 265 (1852) 24
Enterprise Irrigation District v. Canal Co., 243 U. S. 157, 163-164 (1917) 17, 18
Eustis v. Bolles, 150 U. S. 361, 366 (1893) 17

Matter of Fabbri, 2 N. Y. 2d 236, 239 (1957) 21, 24
Forsyth v. Hammond, 166 U. S. 506, 517-518 (1897) 13
Fox Film Corp. v. Muller, 296 U. S. 207, 210-211 (1935) 17

Garr, Scott & Co. v. Shannon, 223 U. S. 468, 470 (1912) 17
In re Gemeinde Feldis, 24 B. E. [1] 312 (1898) 25

Hale v. Lewis, 181 U. S. 473, 479-480 (1901) 17
Haley v. Breeze, 144 U. S. 130 (1892) 17
Harrison v. Nixon, 34 U. S. 442, 445 (1835) 24
Heiser v. Woodruff, 327 U. S. 726, 733 (1946) 13

Klinger v. Missouri, 80 U. S. 257, 263 (1871) 17

Lynch v. New York, 293 U. S. 52, 54-55 (1934) 17, 18

Mental Hygiene Dept. v. Kirchner, 380 U. S. 194, 198 (1965) 17
Moran v. Horsky, 178 U. S. 205, 215 (1900) 17
Morris v. Jones, 329 U. S. 545 (1947) 14

PAGE

Northern Pac. R. Co. v. Ellis, 144 U. S. 458, 464 (1892) 17
In re Nussle, 43 B. E. [1] 77 (1917) 25

Pierce v. Somerset Railway, 171 U. S. 641, 648 (1898) 17

Rector v. Ashley, 73 U. S. 142 (1867) 18
Reed v. Allen, 286 U. S. 191, 193, 199 (1932) 13

Matter of Schneider, 198 Misc. 1017 (Surr. Ct., N. Y. Co., 1950) 20, 22, 23
Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N. Y. 304, 307 (1929) 13
Stembridge v. Georgia, 343 U. S. 541, 547-548 (1952) 18
Stoll v. Gottlieb, 305 U. S. 165, 172 (1938) 13

Walter A. Wood Co. v. Skinner, 139 U. S. 293 (1891) 17
Wilkins v. Ellett, 76 U. S. 740, 741-742 (1869) 24
Williams v. North Carolina, 325 U. S. 226, 230 (1945) 13
In re Wohlwend, 9 B. E. 507 (1883) 25

Miscellaneous:

American-Swiss Private Law, 47 Col. L. Rev. 186, 195 (1947) 21
4 Martindale-Hubbell, Law Digests 3300 (1966) 9
5 Miller on Treaties and Other International Acts of the United States 869 21–22

IN THE

Supreme Court of the United States

October Term, 1966

No. 386

IN THE MATTER OF

THE APPLICATION TO OPEN, VACATE AND SET ASIDE A DECREE OF THE SURROGATE'S COURT GRANTING LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED ON THE ESTATE OF MARCEL J. ROUGERON,

Deceased,

JULES JEAN ROUGERON,

Petitioner-Petitioner,

against

JEANNE A. ROUGERON,

Respondent-Respondent.

On Petition for Writ of Certiorari to the Court of Appeals State of New York

BRIEF IN OPPOSITION

Opinions Below

The opinion of Surrogate DiFalco denying the petition of petitioner herein to open, vacate and set aside decrees of the Surrogate's Court on the ground that petitioner had

already adjudicated the question of whether he had an interest in this estate is printed in the record below (A6-9)* and is reported in the New York Law Journal of February 4, 1963, at pp. 16-17. The subsequent affirmances by the Appellate Division (First Department) and by the Court of Appeals are reported in 24 AD 2d 705 and 17 NY 2d 264 respectively. Each of these decisions is set forth in the Appendix to the petition for certiorari herein.

Question Presented

Whether petitioner is to be permitted to relitigate his claim of an interest in this estate, which claim he concededly litigated to a final determination prior to the institution of the present proceeding?

More specifically, where petitioner in the prior Surrogate's Court proceeding—long since final—urged as the basis of his claim the Swiss-American Treaty of 1850, may he relitigate in a second proceeding in the same Surrogate's Court the very same question of whether he has an interest in this estate, solely because he has now changed his theory as to the meaning of that treaty?

We submit that the answer is "no"—as each of the three courts below have held.

Nature of the Case

This is a dispute as to who is entitled to the estate of Marcel J. Rougeron: his widow, to whom he bequeathed his entire estate by a will now concededly validly admitted to probate in New York, or an illegitimate son who asserted his claim in a prior proceeding and now attempts to

* References are to the Appendix in the court below.

relitigate his claim in a second proceeding in which the present petition for certiorari is filed.

The decedent, a citizen of the United States, domiciled in the State of New York, died in Switzerland on April 15, 1954 leaving a will in which he named his wife of many years, the respondent herein, his sole heir to receive his entire estate (A34-35, 44-45, 54, 244). The decedent's property consisted of funds in a number of banks in New York City (where decedent had lived and worked for almost half a century) and in a Swiss bank, stocks in four United States corporations, some American Express Company traveler's checks and a check on the Royal Bank of Canada (A234-236, 210-212). Some of the stock certificates were held by a New York bank and the rest were with the decedent and his wife in Switzerland (A180-182, 252).

In 1903, in France, the decedent had fathered the petitioner herein and, according to petitioner, acknowledged him to be his illegitimate child (A233). Petitioner has always been a resident and citizen of France (A204, 205, 222). Decedent married respondent in Illinois in 1937. When he died, she was 73 years old; today she is 86 years old. Petitioner has claimed a share in decedent's estate, contrary to the terms of decedent's will. Petitioner has litigated this single issue in Switzerland, in France and, now, this lawsuit is the second time in 12 years that he is litigating it in this country.*

* In this 12 year period, petitioner has never verified a pleading. Four different attorneys-in-fact have acted for him in this country alone, through seven different lawyers or law firms. His present attorney has never come forward with proof that he is the attorney-in-fact.

In the first suit in this country (the probate proceeding brought by the widow in New York on April 1, 1955), petitioner appeared and filed objections attacking the validity of the will and claiming that decedent was domiciled in Switzerland and specifically asserting that he was entitled by the application of the Swiss-American Treaty of 1850 to a forced share in the estate (A222, 223, 225-228).* As will be seen, except that he now concedes the validity of the will and the New York domicile, and has changed his interpretation of the treaty, petitioner's claim in the second New York suit (the present suit—in which he now seeks certiorari) is precisely the same: that is, that, under the treaty (as he now interprets it), he is entitled to share in this estate.** What petitioner would overlook is that he litigated that question to a concededly final determination in the first New York proceeding and cannot litigate it again just because he wishes to argue another (and, as we submit is clear, an erroneous) interpretation of the same treaty.

In the first New York suit, the widow, on March 16, 1956, moved to dismiss petitioner's objections on the ground that decedent was domiciled in New York and that under the laws of New York an illegitimate child did not have an inde-

* The petition for certiorari is plainly in error in stating (p. 8) that the New York court in the first proceeding had "no hint" that the will had been filed in Geneva. To the contrary, the court was very specifically aware of that fact from the petition which expressly stated "the original will is now on file in the office of the Court of Justice of Peace of the Republic and Canton of Geneva, Switzerland" (A35). Indeed, the court's own decree explicitly noted this (A243).

** The petition for certiorari is again plainly in error in stating (p. 8) that petitioner "opposed the grant of the letters on the single issue of domicile and no other issue". As the Court of Appeals noted (17 N. Y. 2d, at p. 271) and as the record explicitly confirms (A225, 226, 228) petitioner also attacked "the validity" of the will.

feasible right to share in the estate of his father contrary to the terms of a valid will and, accordingly, petitioner had no rights in the estate (A228-232). The New York Surrogate heard the evidence of both parties and, determining that decedent died domiciled in New York, dismissed petitioner's objections by order dated March 19, 1957 and, by decree dated May 16, 1957, admitted the will to probate (A232-239, 242-244). Letters of Administration with the will annexed thereafter issued to The Hanover Bank which proceeded to administer the estate according to law.

Petitioner appealed to the Appellate Division, First Department from, among other things, the order of March 19, 1957 determining that he had no interest in the estate. He did not prosecute the appeal, however, and the Appellate Division on June 28, 1957 dismissed the appeal (A240-242). There is no dispute that that order is final and personally binding on petitioner.

On October 6, 1958, the administrator c.t.a. filed its account together with its petition for judicial settlement of the estate (A248-249). Since the Court had previously finally adjudicated that petitioner herein had no interest in this estate, he, of course, was not cited. Thereafter, by decree dated December 2, 1958, the Surrogate settled and allowed the account and, in accordance with the decedent's will, the estate was distributed to the widow (A248-252).

Five years after the will was probated and some two and a half years after final distribution of the estate assets, on May 11, 1961, petitioner herein brought the present proceeding—the second suit in New York in which he appeared as

a party to litigate the question of whether he should share in this estate.

In this second New York suit petitioner asserted that there was fraud in the earlier suit (which allegation he abandoned at the trial below) and that, contrary to the interpretation he urged at the earlier trial, the treaty's application turned on physical location of property rather than domicile of the decedent. That decedent died domiciled in New York is, however, no longer disputed; it is, indeed, expressly conceded in petitioner's supplemental memorandum in the Surrogate's Court below (p. 6), in petitioner's brief in the Appellate Division below (pp. 2, 37) and in petitioner's brief in the Court of Appeals below (pp. 2, 38, 41).

All that remained then in this second suit was petitioner's second interpretation of the Swiss-American Treaty of 1850 (that each piece of personal property of a U. S. citizen and domiciliary dying in Switzerland must devolve in accordance with the law of the place where some indicia of that specific item of property was physically situated at the moment of death)—an interpretation, as will be seen, that is so novel that it has never been accepted by any court or supported by any commentator in the 116 year history of the treaty and is contrary to the rule, uniformly and expressly adopted in this country and in Switzerland, that all personal property of a decedent devolves in accordance with the law of his domicile.

Petitioner sought below to explain the staleness of this second suit in New York (brought in 1961) by asserting that it was not until 1959 that he learned that decedent had per-

sonal property with him when he died and that the Surrogate in 1957 was also not aware of that fact. That, as the Court of Appeals explicitly stated, was proven by the record "conclusively" not to be so. (17 NY2d, at p. 271.) And, not only is that determination by the Court below completely supported by the record (A226, 152, 234, 222), but the transcript of the hearing before the Surrogate in the first New York suit on January 14, 1957 further confirms beyond question that petitioner and the Surrogate both were well aware of the fact that this decedent had personal property with him in Switzerland when he died. Petitioner's attorney at that time told the Surrogate (pp. 4-5):

> "I feel that the court in Switzerland threw the case out because they felt that at the preliminary stages it was not necessary for the protection of Jean Jules Rougeron that they attach the property * * *." *

The Surrogate in this second New York suit dismissed the petition because petitioner had already litigated to a final determination the question of whether he had an interest in this estate (A6-9). The Appellate Division unanimously affirmed, without opinion (A256-257) and the Court of Appeals likewise affirmed (17 N.Y. 2d 264). The latter court not only held that petitioner was barred by the prior final decree (pp. 270-271), but went on to consider the merits of petitioner's new allegations as to the meaning of the treaty and ruled against him on that ground also (pp. 271-273).

---

* The petition for certiorari, however, continues to mislead in this connection by continuing incorrectly to state (pp. 8, 9) that the petitioner did not know that decedent had personal property with him when he died.

Petitioner alludes to the proceedings abroad and suggests that "there is something wrong" (Pet. for Cert., p. 29) in the widow having taken decedent's personal property back to New York after he died; that if she had left these stock certificates, traveler's checks and bank books in Switzerland for the 4½ years after decedent's death until petitioner obtained a decision from a Geneva court (on the facts presented to it) that decedent was domiciled in Switzerland, petitioner would be able to claim his forced heirship.

Significantly, however, petitioner did not see fit to place in the record below the full facts of the foreign proceedings. Nor did petitioner brief this argument in the Courts below, having erroneously founded his argument on an alleged lack of disclosure to the New York court in the first New York proceeding. This failure apparently created some confusion in the Court of Appeals and the dissent. However, enough of the foreign proceedings are in the record, to demonstrate that the decision below is eminently correct and there are no new or important questions raised by this case.

In addition to the two suits in New York (the second of which, as indicated, is the subject of the present petition for certiorari) there have been proceedings between these same parties (the widow and petitioner) in France and Switzerland concerning this same estate. In France, petitioner asserted that decedent was a French national, had died domiciled in Switzerland and by virtue of French law was entitled to a share in the estate (A196-197). The French courts held (as late as June 7, 1960), as had the

New York court in 1957, that decedent died domiciled in New York and that appellant had no interest in the estate (A203-217).

In Switzerland, in January 1955, petitioner brought a proceeding to attach the personal property of decedent and prevent the widow from bringing it back to the United States. The Swiss courts refused to compel the widow to keep the property in Switzerland (A233) and, accordingly, she did nothing wrong in returning it to the United States. These were, it must be remembered, stock certificates in the decedent's name in United States corporations, bank books on United States banks in the decedent's name and traveler's checks of a United States issuer.

Thereafter, on January 14, 1957, some two years *after* the commencement of the first New York suit in which petitioner litigated his right to share in the estate, petitioner brought a suit in Switzerland alleging that decedent was domiciled in Switzerland and that (again contrary to what he alleges in this suit) decedent's personal property devolved in accordance with the law of his domicile (A103, 104). On November 4, 1958, four and a half years after the New York probate proceeding, an intermediate court in Geneva, reversing the trial court, found Swiss domicile and, applying the rule (which petitioner in this case would not follow) that personal property goes according to the law of the domicile, decreed forced heirship notwithstanding the will (A142-175).*

---

* This Geneva court decision has been "much criticised" in Switzerland for denying to United States citizens domiciled in Switzerland the right to eliminate by will the forced heirships provided by Swiss law. 4 Martindale-Hubbell, Law Digests, p. 3300 (1966).

Significantly, the Swiss court, as has every court that has ever considered the question—in this country and in Switzerland—expressly held, contrary to petitioner's theory in this case, that the decedent's personal property must devolve according to the law of his last domicile (A168).

In short, the three New York courts below were all correct and for more than one reason. In the first place, petitioner has already litigated to a final determination in an earlier New York proceeding the question of whether he has an interest in this estate (including the very same treaty provision that he urges in this second proceeding). And, in the second place, his theory that the treaty divests the New York courts of jurisdiction to grant probate of the wills of New York domiciliaries and requires the fragmentation of estates, that is, the devolution of each piece of personal property according to the law of the country where each item may be physically located at the moment of death, is totally unsupportable.

That being so, and it also being so that this petitioner has already litigated the question of his right to share in this estate, the three courts below were each correct in denying the petition and this petition for certiorari should likewise be denied for the decisions below are correct, involve no new principles of law and are founded on *res judicata*, an adequate state ground.

ARGUMENT

I

Petitioner litigated to a concededly final determination the question of whether he has an interest in this estate in the first New York proceeding. He argued the treaty in that proceeding. The fact that he seeks now to urge another interpretation of that same treaty does not give him the right to relitigate. Nor does it raise a federal question, *res judicata* being an adequate state ground for decision.

There is nothing new or different in this suit (begun by petitioner in the New York Surrogate's Court in 1961) than was in the earlier suit in the same court in which petitioner was a protagonist (beginning in 1955 and ending in a final judgment in 1957). The only thing new is petitioner's attempt to change his position and argue an interpretation of the treaty contrary to what he argued to a final judgment in the earlier proceeding.

In the first New York suit petitioner expressly raised the very same treaty that he now (in the second suit) urges as the sole basis of his claim for an interest in this estate. In his pleadings in that first suit, dated October 19, 1956, petitioner, in so many words, alleged (A227):

> "That according to the Convention of November 25, 1850 between the Swiss Confederation and the United States of America duly ratified by the United States Senate in 1855, still valid as to the matter of Estates, provides [*sic*] that litigation that may arise between claimants to an estate, with respect to knowing to whom the estate should belong must be brought be-

> fore the Courts and judged according to the laws of the country in which the property is located, namely; by country in which property is located is meant the following: for real estate, place of its location, and for the personalty, that of the last domicile of the deceased, to wit: Switzerland."

As noted, in that first New York case, petitioner lost on the issue of domicile, the Surrogate, after a trial, finding domicile to have been in New York. Petitioner in this second New York case concedes domicile to be in New York, but now urges that the treaty does not refer to the law of the last domicile to determine the devolution of personal property, but looks to the physical location of each item of property at the moment of death. As he put it in his brief below (pp. 15-16):

> "The Treaty * * * gives exclusive jurisdiction to the courts of the situs to determine devolution and distribution * * *. Under the Treaty, domicile is irrelevant and has nothing whatever to do with either the jurisdiction of the courts or the determination of the applicable law of devolution or distribution." *

The only question thus is whether a party having once argued and tried an interpretation of a treaty unsuccessfully to a final judgment can change his position as to that interpretation and, years later, re-argue the case on the sole ground that a treaty is involved.

The courts below in this case have uniformly held that he cannot—and correctly so.

---

* This theory is, of course, one that petitioner concedes has never been adopted in the 116 year history of the Treaty (Appellate Division Brief, p. 11).

The cases recognizing that "a demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever" (*Cromwell* v. *County of Sac*, 94 U. S. 351, 353 [1876]) have been, as Mr. Justice Cardozo noted, "elaborated with special emphasis in many judgments of the Supreme Court" and "is not the doctrine of that court alone" (*Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 307 [1929]).

As respondent pointed out below—and as all three courts below held—"* * * those who have contested an issue shall be bound by the result of the contest, and * * * matters once tried shall be considered forever settled as between the parties" (*Baldwin* v. *Iowa State Travelling Men's Assn.*, 283 U. S. 522, 525 [1931]). The cases so holding are legion. See, e.g., *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938); *Heiser* v. *Woodruff*, 327 U. S. 726, 733 (1946); *Reed* v. *Allen*, 286 U. S. 191, 193, 199 (1932).

As we argued below—and as the courts below all held—the rule that "as between the parties" one of them may not "reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded", as this Court has explicitly stated, "applies also to jurisdictional questions." "After a contest these cannot be relitigated as between the parties." *Williams* v. *North Carolina*, 325 U. S. 226, 230 (1945). And, as this Court has also noted, this is but well-settled law. See, e.g., *Davis* v. *Davis*, 305 U. S. 32, 43 (1938); *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29-30 (1917); *Forsyth* v. *Hammond*, 166 U. S. 506, 517-518 (1897).

Petitioner has not cited nor can we find any case that holds otherwise. In no case was a right litigated and then permitted to be relitigated by the same party, as petitioner seeks here to do with respect to his asserted right to share in a part of this decedent's estate. In point of fact, *Morris* v. *Jones,* 329 U. S. 545 (1947), cited by petitioner (Pet. for Cert., p. 19), not only does not help him, but confirms that the courts below were correct. Relying on "res judicata" as one of the reasons for requiring a Missouri judgment to be given full faith and credit, this Court explicitly said (p. 551):

> "* * * a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment."

In sum, the decision below rests—and was rested—on a plainly adequate state ground. And the fact that the Court of Appeals went on to rule against petitioner also on his latest theory as to the meaning of the treaty, does not change that. Petitioner tells us (Pet. for Cert., p. 19) that "We can dispose quickly of any suggestion that there is an 'adequate State ground' for the decision, i.e. that the case was decided on a point of procedural estoppel under State law and the federal questions need not be reached. Both the majority and dissenting opinions excluded estoppel and both opinions decided the federal questions on the merits." That is not so. The third sentence of the dissent expressly states: "It has been held that appellant is estopped by the order of the Surrogate admitting the will to probate in New York County [the first New York suit]" and that, indeed, is what the Court of Appeals, the Appellate Division and the Surrogate each held below. Chief Judge Desmond,

writing for the majority in the Court of Appeals, pointed out (17 N. Y. 2d, at p. 270):

> "Respondent, while disagreeing with petitioner as to the meaning and applicability of the treaty (and calling to our attention that petitioner pleaded this same treaty as a basis for relief to him in the probate proceedings), takes her stand firmly on the proposition that the unappealed New York Surrogate's decree directing probate of the will on a finding after testimony taken that decedent had his domicile in New York is a complete bar to any demand or claim of petitioner [citing the leading federal and New York *res judicata* cases]."

The opinion goes on to say (as does respondent herein) that "the meaning and application of a treaty is still a question of law which if decided erroneously must be reviewed on appeal, otherwise the judgment is conclusive". In other words, as the Court goes on, since the Surrogate in the first New York case (the probate suit) had jurisdiction of the general subject matter, if the petitioner did not like the Surrogate's treatment of the treaty question, petitioner should have raised that on appeal and, failing to have appealed, the judgment is conclusive as to him. In Chief Judge Desmond's words (17 N. Y. 2d, at p. 271):

> "The Surrogate's Court of New York County had general subject-matter jurisdiction as to probate of wills and as to the probate of the will of this decedent who had a residence in New York and property there. Petitioner never really took a position different from this in the Surrogate's Court (he asked the court to rule that the will was 'invalid') although he now tardily asserts that the Surrogate's jurisdiction extended only to entering an order against the respondent and

directing her to return the property to Switzerland and to the Swiss courts. The petitioner seems to be arguing also that he should not be charged with estoppel or waiver because, so he intimates, he did not know that valuable property of the estate had been taken from Switzerland to New York. The record before us, however, proves conclusively that petitioner did know this fact at the time of this New York probate.

"We turn to the treaty. * * *"

The majority thus, as the dissent expressly confirms, decided that petitioner was barred by the prior proceeding, as well as being wrong in his latest interpretation of the treaty.

The Surrogate in this case (and the Appellate Division by its unanimous affirmance without opinion) stopped at the state ground for decision and did not go on to consider the treaty question. Thus, the Surrogate wrote (A7):

"Having allowed the decree which held him to be without any interest in this estate to become final without appeal, the petitioner was obviously incapable of objecting to the account of the fiduciary filed thereafter. In apparent recognition of the situation the administrator c.t.a. in the proceeding for the settlement of its account quite properly omitted to cite the moving party as a respondent for the question of his right to participate in matters affecting the estate had already been clearly resolved against him. Lacking any interest in the estate he is not now entitled to an order setting aside and nullifying the decree settling the account."

This petitioner, in other words, squarely litigated to a final judgment in the truly adversary first New York proceeding the sole question involved here in this second New

York suit—whether he had an interest in this estate. Having done so, petitioner cannot now raise that question again, as the courts below have each held. And that determination raises no federal question. As this Court said in *Lynch* v. *New York*, 293 U.S. 52, 54-55 (1934):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

That that is so, that this Court will not review a state court decision where a state ground of decision is sufficient to support the judgment so that the asserted federal grounds are not necessary to the decision below, has long been the rule. See, e.g., *Klinger* v. *Missouri*, 80 U.S. 257, 263 (1871); *Eustis* v. *Bolles*, 150 U.S. 361, 366 (1893); *Allen* v. *Arguimbeau*, 198 U.S. 149, 154-155 (1905); *Walter A. Wood Co.* v. *Skinner*, 139 U.S. 293 (1891); *Enterprise Irrigation Dist.* v. *Canal Co.*, 243 U.S. 157, 163-164 (1917); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210-211 (1935); *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 198 (1965).

And, that *res judicata* is an independent state ground for decision broad enough to sustain a judgment is also beyond question. See, e.g., *Northern Pac. R. Co.* v. *Ellis*, 144 U.S. 458, 464 (1892); *Haley* v. *Breeze*, 144 U.S. 130 (1892); *Garr, Scott & Co.* v. *Shannon*, 223 U.S. 468, 470 (1912); see, also, *Hale* v. *Lewis*, 181 U.S. 473, 479-480 (1901) (estoppel by waiver); *Pierce* v. *Somerset Railway*, 171 U.S. 641, 648 (1898) (estoppel by laches and acquiescence); *Moran* v. *Horsky*, 178 U.S. 205, 215 (1900) (laches); *Enterprise Irrigation Dist.* v. *Canal Co.*, *supra*, 243 U.S.

157, 165 (1917) (estoppel *in pais*); *Rector* v. *Ashley*, 73 U.S. 142 (1867) (statute of limitations).

In short, as has always been the rule, if the state judgment could have been rendered without reaching the federal question, certiorari cannot be granted. See, e.g., *Lynch* v. *New York, supra*, 293 U.S. 52, 54 (1934); *Cuyahoga Power Co.* v. *Northern Realty Co.*, 244 U.S. 300, 303-304 (1917); *Consol. Turnpike* v. *Norfolk etc. Ry. Co.*, 228 U.S. 596, 599 (1913); *De Saussure* v. *Gaillard*, 127 U.S. 216, 234 (1888).

Indeed, even beyond that, in *Stembridge* v. *Georgia*, 343 U.S. 541, 547-548 (1952), this Court said:

> "We are without jurisdiction when the question of the existence of an adequate state ground is debatable. *Bachtel* v. *Wilson*, 204 U.S. 36."

Here, there is no debate. This petitioner tried out the question in the first New York proceeding (long since reduced to final judgment against him) as to the meaning of the treaty and whether under its application he has an interest in this estate. On fundamental principles, as the courts below have held, he cannot try out that question again in this second suit in the same court.

For that reason alone, the petition herein must be denied.

II

There is nothing wrong or novel in the decisions below that the entire estate passed to the widow pursuant to the express terms of the will.

Petitioner's sole claim on the merits is that the Surrogate's Court lacked jurisdiction over part of the subject matter, that is, over any item of personal property which he contends "had its *situs* in Switzerland on date of death" (Brief below, p. 20). Absent the treaty, petitioner does not question that the New York Surrogate's Court had jurisdiction over *all* of this decedent's personalty and that all of it properly passed to the widow pursuant to the express terms of the will. As he put it: "If there were no Treaty, the Surrogate would normally apply New York law to all decedent's personalty including that part which had its *situs* in Switzerland" (Brief below, p. 26). Yet, arguing that "domicile * * * has nothing whatever to do with either the jurisdiction of the courts or the determination of the applicable law of devolution" (Brief below, pp. 15-16, 20) and conceding that his theory may produce "a result strange or incomprehensible" (Appellate Division Brief, p. 22), or "a result exactly the opposite of that which would be reached in a conventional decedent's estate" (Brief below, p. 26), petitioner contends—and the statement of the contention alone is enough to evidence its lack of merit—that the Swiss Treaty of 1850 requires this Court to rule that, as he put it in his memorandum in the Surrogate's Court below (p. 33), "each piece of [personal] property" of this United States citizen and New York domiciliary must be distributed according to the laws of distribution of the place where it was situated at the moment of death.

To give face to his argument petitioner claims that he raises novel questions. But, there is no novelty here: petitioner is merely arguing something that has been so well understood, so well settled differently than he now urges, that nobody before has sought to make the contention that he now makes. In point of fact, the treaty does not require this fragmentation of estates, has never been so construed and has uniformly been construed to an opposite effect. Indeed, even in the sole American case cited on this point by petitioner (*Matter of Schneider,* 198 Misc. 1017 [Surr. Ct., N. Y. Co., Frankenthaler, S., 1950]), it was held, contrary to petitioner's position here, that our Surrogate's Court had jurisdiction where there is involved, as here, the estate of a New York domiciliary. And, more than that, in the Geneva court's decision in this case in 1958, it was also held, again contrary to the position of petitioner here, that "There is no doubt that the Treaty of 1850 subjects the estate to the law of the last domicile" (A168). The Court made no division between supposedly "Swiss" items of personal property or "New York" items of personal property—to the contrary, it held that *all* personal property devolved in accordance with the law of the decedent's domicile. And this decedent's domicile, even petitioner now agrees, was correctly determined to be New York (Brief below, pp. 2, 38, 41). Petitioner thus is contending that the New York courts lack jurisdiction to do what it (and also the Swiss court) has done, namely to prescribe that all of this decedent's personal property should devolve in accordance with the law of his domicile.

The construction of the treaty urged by petitioner would do violence to long-settled concepts and to the intent

of the draftsmen of the treaty and would, as petitioner himself explicitly recognized, "lead to a result strange or incomprehensible in New York" (Appellate Division Brief, p. 22) and, we would add, in Switzerland as well.

Here, we are concerned with personal property, not real estate and, as the Surrogate recognized in denying petitioner's claimed interest in this estate in the first New York suit, the undoubted rule is that the law of the domicile governs the devolution of personal property (see, *Matter of Fabbri*, 2 N. Y. 2d 236, 239 [1957]) and nothing in the treaty changed that.

Nussbaum, a recognized authority on the subject thus but confirms the obvious when he tells us (*American-Swiss Private International Law*, 47 Col. L. Rev. 186, 195 [1947]) that it has long been understood that there was, even before the time of the Swiss-American Treaty of 1850, "in Europe as well as in this country a familiar theory which considered movables as legally situated at their owner's domicile." Noting that, precisely as we submit here, "in fact it would be absurd to subject, in the case of widely dispersed movables, each particular cluster of them to a different local inheritance law", the author concludes, as did the Message of the Swiss Federal Council of December 3, 1850 to the Swiss Federal Assembly in explanation of Article VI of the treaty, that "both parties were 'very certain' that Article VI would be given only that meaning attributed to the text of the Treaty of 1847, namely, the control of the law of the last domicile over the entire inheritance question" (Nussbaum, *op. cit., supra*, pp. 195-196). This is the uniform view of the commentators (see, e.g., 5 *Miller on Treaties and Other International Acts of the*

United States 869), as petitioner's failure to cite any to the contrary confirms.

Also confirming this view, Surrogate Frankenthaler, in *Matter of Schneider, supra,* 198 Misc. 1017, at p. 1025 (1950), observed that Article VI of the treaty represented no departure from traditional doctrine but merely "represents a crystallization of extant rules of private international law" and that, as the Swiss cases themselves confirm, the treaty reference to the place where property is "situated" refers all questions to the law of the country of domicile. Thus, he wrote (at p. 1026):

> "The language in the Swiss cases, most of which pertain only to the question of the jurisdiction of courts, indicated that the place in which 'property is situated', as referred to in the treaty, means, in the case of foreign domiciliaries, the country of domicile, upon the Swiss legal fiction that a decedent's entire estate follows his person and is located at his domicile. Such a rule amounts to a statement that the place of *actual* location of property (Switzerland) refers all questions to the law of the place of *presumed* location i.e., the country of domicile." (Emphasis in original.)

The treaty was thus quite apparently designed to produce the uniformity with which both contracting nations were familiar and which has long been recognized as the only common sense way of administering the personal property of a decedent. Yet, petitioner would apply it here to produce the concededly opposite effect, to fragmentize the administration of estates and to make the devolution of any particular item of personal property depend entirely on the fortuity of its location at the moment

of death; a result which Nussbaum rightly denominates "absurd" and which, as petitioner's brief confirms, no case sanctions.

In sum on this point, even on the merits and apart from the fact that the treaty is inapplicable to this case and that petitioner is barred on familiar grounds of *res judicata* from relitigating his claim to an interest in this estate, it is readily seen that the New York courts had jurisdiction to admit the will to probate as valid to pass title to all of this decedent's estate. And, not only is reason and all applicable authority opposed to petitioner's claim, but his own cited authorities (the Treaty of 1850 and *Matter of Schneider, supra*) on analysis support the widow's position that the New York courts had jurisdiction over all of the assets of this estate and that there is no basis for setting their decisions aside.

More than that, the rationale of the Swiss cases would similarly distribute personal property according to the law of the domicile for the very decision of the Geneva court which petitioner urged when he argued the question of domicile below ruled that the property—all of the property—should go by the law of Switzerland only because it found that decedent was domiciled in Switzerland. As the Geneva court put it (A168): "There is no doubt that the Treaty of 1850 subjects the estate to the law of the last domicile * * * the place of location of personal property was the last domicile of the deceased."

It follows that if the Geneva court had found a New York domicile, as the Surrogate did on the full facts pre-

sented to him (A232-237), and as did the French courts thereafter (A204-213), it would have applied New York law for the principle it was observing was the same as our courts traditionally observe, namely that "the law of * * * [the domiciliary] state determines the validity and effect of the will with respect to the disposition of personal property." *Matter of Fabbri, supra,* 2 N. Y. 2d 236 (1957). This has been the unquestioned rule from earliest times. See, e.g., *Harrison* v. *Nixon,* 34 U. S. 442, 445 (1835); *Ennis* v. *Smith,* 55 U. S. 251, 265 (1852—where this Court said: "For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time, that it may now be said to be a part of the *jus gentium*"); *Wilkins* v. *Ellett,* 76 U. S. 740, 741-742 (1869—where this Court said: "It has long been settled, and is a principle of universal jurisprudence, in all civilized nations, that the personal estate of the deceased is to be regarded for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile").

And this has concededly been the rule uniformly applied in every case where a United States domiciliary died in Switzerland or vice versa. See, for example, *Matter of Batsholts,* 188 Misc. 867 (Surr. Ct., N. Y. Co., 1946), where Surrogate Delehanty, refusing to assume jurisdiction over the estate of an American citizen leaving assets in New York on the ground that he was domiciled in Switzerland, wrote (p. 869):

> "Since the law of deceased's domicile will apply to the disposition of his personalty there would be no reason why this court should concern itself with any controversy over his testamentary acts. Such controversies are properly remitted to the domiciliary jurisdiction" [citing cases].

Likewise, in *Matter of Barandon,* 41 Misc. 380 (Surr. Ct., N. Y. Co., 1903), our courts assumed jurisdiction over the entire estate where there was real and personal property here and personal property in Switzerland and applied the law of the domicile (Switzerland) to all of the personal property.

And, the highest tribunal in Switzerland has similarly referred to the law of the last domicile to determine the devolution of personalty. See, *In re Nussle,* 43 B. E. [1] 77 (1917), where the Swiss Federal Tribunal acknowledged Illinois jurisdiction over the estate of a Swiss national domiciled in Chicago, even though he possessed personal property in Switzerland; *In re Gemeinde Feldis,* 24 F. E. [1] 312 (1898), where the Federal Tribunal assumed jurisdiction over the personal estate of a person of dual United States-Swiss citizenship on the ground that he was domiciled in Switzerland; and *In re Wohlwend,* 9 B. E. 507 (1883), where the Federal Tribunal refused jurisdiction over the estate of a similar dual citizen who died leaving property in Illinois and a bank account in Switzerland, again on the ground that the decedent was domiciled in Illinois.

The courts of this country and Switzerland thus both plainly reject petitioner's basic contention that "domicile

is irrelevant and has nothing whatever to do with either the jurisdiction of the courts or the determination of the applicable law of devolution or distribution" (Brief below, pp. 15-16, 20).

Petitioner now says that it was wrong for the widow to remove the stock certificates, bank books and traveler's checks from Switzerland after her husband died, that this was "self-help" and not "civilized" and reason for this Court to intervene (Pet. for Cert., pp. 3, 31-35). But, the widow was not obliged to hold those papers in Switzerland for years on the chance that a suit might be brought and that there might be a finding (4 years later) of forced heirship.* She did what anyone in her position should have done: she sent the securities, checks and bank books home to New York City—where her husband had lived most of his life, where he maintained his bank accounts, where they paid their New York State income taxes and which he referred to as "home" in correspondence to his bank shortly before his death. Indeed, when the Swiss court in the proceeding brought by petitioner in January 1955 specifically refused to attach the property or, as the Surrogate noted in the first New York suit (A233) "to compel her to turn over to a notary to be appointed by the court all the assets of the decedent to be managed by him pending distribution" the Swiss court was specifically permitting her to return

* The petition for certiorari is incorrect in suggesting (pp. 4, 15, 28, 31) that the "personal property" had "been transported to New York *pendente lite*". In point of fact, as petitioner's own evidence shows, after he lost his suit to attach the property, petitioner's next suit in Switzerland was not brought until January 14, 1957 (A103-104), almost two full years after the New York probate proceeding had been brought and long after the widow returned the stocks, bank books and traveler's checks to New York.

the securities, bank books and checks to New York. Thus, there was no "self-help * * * hardly conducive to a peaceful international order" which petitioner claims to be "exactly what has happened in this case" and "a point which the majority opinion below ignores" (Pet. for Cert., pp. 3, 30-34). To the contrary, the majority opinion below specifically notes that prior to the widow returning the stock certificates, bank books and checks to New York, petitioner failed in his effort to obtain "a sequestration order" (17 N.Y.2d, at p. 269).

Nor did the widow do anything not conducive to comity immediately after her husband's death when she appeared before a Swiss Notaire (as she was obliged to do in accordance with Swiss tax law and procedure) who caused a preliminary certificate of inheritance to issue (A42-54). Such is the usual practice in the Canton of Geneva when a decedent dies with a will prepared in Geneva—and probably held by a local Notaire (A45, 54, 89). It is significant to note that the certificate that was issued specifically stated that it was "without prejudice of all actions for annulment (of the last will) or all petitions for right of inheritance" —including, it must be pointed out, the widow's right to inherit under the laws of her American husband's New York domicile on a full showing of all of the facts necessary to establish domicile (A57). In any event, as the petitioner's suit to restrain removal of the property from Switzerland demonstrates, the widow had the admitted right to send the bank books, stock certificates and traveler's checks home when she did.

Conclusion

The petition herein presents no novel or wrongly decided questions. Nor was there any determination not supported by an adequate state ground of decision. It is, in short, nothing more than further protraction of already extended prior litigation.*

Respondent respectfully submits that a writ of certiorari in this case can serve no useful purpose and should be denied.

Respectfully submitted,

FRANCIS S. BENSEL
BUD G. HOLMAN
Counsel for Respondent-Respondent

KELLEY DRYE NEWHALL MAGINNES & WARREN
Of Counsel

---

* In this connection, it should be noted that subsequent to the affirmance by the Court below, petitioner sought to serve respondent, through the French Consulate in New York, with papers in another proceeding in France.

Office-Supreme Court, U.S.
FILED
OCT 7 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966

No. 386

JULES JEAN ROUGERON, *Petitioner,*

v.

JEANNE A. ROUGERON, *Respondent.*

On Petition for Writ of Certiorari to the Court of Appeals State of New York

RESPONSE OF PETITIONER TO OPPOSITION OF RESPONDENT

PHILIP W. AMRAM
700 Colorado Building
Washington, D. C. 20005

AMRAM, HAHN & SUNDLUN
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 386

JULES JEAN ROUGERON, *Petitioner,*

v.

JEANNE A. ROUGERON, *Respondent.*

On Petition for Writ of Certiorari to the Court of Appeals State of New York

---

RESPONSE OF PETITIONER TO OPPOSITION OF RESPONDENT

A short response to the Opposition filed by the Respondent is warranted.

1. Respondent first argues that the Petition should be rejected because of an "adequate state ground for decision". There are four immediate answers.

(a) Under New York practice, the right to be heard in the Court of Appeals closely resembles the *certiorari* practice of this Court. Appeals may be taken only upon permission, either of the Appellate Division

or of the Court of Appeals itself. However, one Section of the appeals statute (§ 5601) grants an exception to this "allowance" practice and permits an appeal of right, but only if the case necessitates the decision of federal constitutional questions.

Pursuant to this Section, the appeal was taken in this case from the Appellate Division as of right, (App. p. 10a) raising only federal constitutional questions and no others.

Respondent promptly moved to dismiss the appeal on the ground that there was an adequate state ground for decision, namely, procedural estoppel under state law. This motion was denied unanimously by the Court of Appeals. 14 N.Y. 2d 882.

The Surrogate and the Appellate Division had both refused to consider any of the federal questions and both had disposed of the case on the ground of procedural estoppel. That was the reason for the appeal to the Court of Appeals. Both the four-man majority and the three-man minority in the Court of Appeals decided the case on the federal questions.

Both the majority and the dissenting opinions noted that procedural estoppel had been argued vigorously by the Respondent (App. pp. 5a, 8a, 9a) but, as the majority opinion said:—

> "*But the meaning and application of a treaty is still a question of law which if decided erroneously must be reviewed on appeal,* otherwise the judgment is conclusive." (emphasis supplied) (App. p. 5a)

(b) Further, there could be no procedural estoppel in any event.

The Opposition opens its section on procedural estoppel with the sentence:—

> "There is nothing new or different in this suit (begun by petitioner in the New York Surrogate's Court in 1961) than was in the earlier suit in the same court in which petitioner was a protagonist (beginning in 1955 and ending in a final judgment in 1957)". (Opposition, p. 11)

This statement is not sustained by the record and is negated in the opinion of the Court of Appeals.

The only issue presented in the 1955 proceedings in New York was the question of the propriety of the *probate* of the will (App. pp. 1a, 2a) with respect to assets which were admittedly in New York on date of death (App. p. 9a). The only ground of contest was the domicile of the decedent (App. pp. 2a, 8a) and the Surrogate quite properly dismissed Petitioner's objections to the *probate* because he had no interest in the *New York assets* under New York law. This was unanswerably correct. None of the questions presented in the 1961 proceedings (which are now before this Court) were raised or could have been raised in 1955. None of them existed before 1958.

(c) Further, the Court of Appeals constitutionally was required to refuse to decide the case on the ground of procedural estoppel, since such a decision would have directly opposed the constitutional rule laid down by this Court in *Kalb* v. *Feuerstein* and its successors (Pet. p. 19), a rule which Respondent treats with total silence and no response whatever.

As these cases held, the state court may not refuse to decide the federal questions by invoking a state rule of procedural estoppel, and a decision based on

such an estoppel is not based upon an "adequate state ground".

(d) Finally and most important of all, Respondent treats this case as though there were nothing involved except the single question of the interpretation of the language of the Treaty.

But, even if we concede that Respondent is right and the Treaty is a "domicile" treaty, this means only that *both* the Swiss court and the New York court had concurrent jurisdiction (because Rougeron was domiciled in New York under New York doctrine and was also domiciled in Geneva under Swiss doctrine). Then an additional international question of major importance is raised.

If courts of two different countries have concurrent jurisdiction over the parties and the subject-matter, how shall their respective rights to adjudicate be resolved, so as to avoid two contradictory judgments *in personam* and *in rem*? (Pet. pp. 27-32) The four-man majority of the Court of Appeals ignored this question; the three-man minority held it to be decisive. (App. pp. 8a-9a)

On this point, the Opposition is silent.

Further, to what extent may the jurisdiction and judgment of a court of another country be frustrated by the "self-help" physical removal of property *pendente lite* to the United States? Here again the four-man majority of the Court of Appeals ignored the question; again the three-man minority held it to be decisive. (App. pp. 8a-9a)

There can be no pretense that either of these two latter questions is disposed of by an estoppel created by

the 1955 proceedings, and the Opposition does not so contend. As to them, there is admittedly no "adequate state ground for decision".

2. It is only necessary to lay the three opinions of the appellate court judges in this case side by side. The treaty, constitutional and international law questions instantly appear.

(a) The Court of Appeals of Geneva decided that it had jurisdiction over the subject-matter, and Swiss law applied thereto, because the Treaty is a "situs" treaty and the propery in question had its "situs" in Switzerland under the Swiss law of "situs" on date of Rougeron's death. (A. 168)

(b) The four-man majority in the Court of Appeals of New York disagreed. They held that the New York courts had jurisdiction over the subject-matter, and New York law applied thereto, because the Treaty is *not* a "situs" treaty, but is a "domicile" treaty; and Rougeron was domiciled in New York on date of death under New York doctrines of domicile. (App. p. 7a) However, the majority ignored the effect of the "self-help" removal of the property from Switzerland to New York by the widow *post-mortem;* ignored the Swiss "situs" of the property under the New York law of "situs"; ignored the "double domicile" of Rougeron in both New York and Geneva; ignored the fact that the widow initiated the first probate in Geneva; and ignored the fact that the Respondent had "taken the law into her own hands" to change the devolution of the property, after she had obtained physical possession under the Swiss probate which she had initiated.

(c) The three-man minority in the Court of Appeals of New York disagreed fundamentally with the majority. They held that the "situs" of the property was "of determinative importance". They held that the *post-mortem* transfer of the property to New York from Geneva should not be given effect to oust the then-existing jurisdiction of the Swiss court or to frustrate its judgment, which the Respondent had never obeyed. They held that effect must be given to the prior Swiss probate proceedings. They held that either the New York court was wholly without jurisdiction or was required to direct the return of the property to Geneva for administration in the Geneva court under the judgment of that court. They held that the New York court had no power to dispose of the property contrary to the earlier Swiss judgment.

3. The question before this Court on this Petition for *certiorari* can be simply stated. Shall these important and novel questions of the meaning and interpretation of the Swiss-United States Treaty and of international law be governed by the four-man majority opinion of the New York Court of Appeals (with its vigorous three-man dissent) and shall the four-man majority opinion be the effective precedent in the United States? Or are these questions such that they should be reviewed and decided by this Court?

Respectfully submitted,

PHILIP W. AMRAM
700 Colorado Building
Washington, D. C. 20005

AMRAM, HAHN & SUNDLUN
Of Counsel